THE

LAW OF EVIDENCE

BY

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PREFACE.

It has been my endeavour in the following pages to supply to practitioners and students a work upon Evidence which should take a middle place between the admirable but extremely condensed Digest of Sir James Stephen, and that great repository of evidentiary law, Taylor on Evidence.

I have, as far as practicable, adhered to one uniform method of arrangement throughout—that of stating: (1) The rules of evidence; (2) the principles upon which they are founded; (3) their various limitations; and (4) the illustrations to the rules. The latter have, for the convenience of the reader, been arranged not only in separate columns according to their admissibility or the reverse, but, wherever possible, in pairs, which present analogous facts but different decisions, the contrasted cases being placed side by side at the same height in the page.

References to the leading English text-books, as well as to the standard treatise of Dr. Wharton on the American law, have also been appended to each branch of the subject.

I gladly acknowledge my indebtedness not only to the latter work, but also to the valuable writings of Professor

James B. Thayer, of Harvard University, whose labours have done so much to elucidate the law of evidence; to the scholarly notes to the last American edition of Best, by (I understand) his former pupil, Mr. C. F. Chamberlayne, to which frequent reference has been made in the present volume; and to other able American writers whose names are mentioned herein.

The number of cases cited has been relatively very considerable; and the references given thereto in the text have been repeated in the Index, with the addition of the various alternative reports to the more modern decisions.

SIDNEY PHIPSON.

7 KING'S BENCH WALK, TEMPLE,
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THE LAW OF EVIDENCE.

BOOK I.

PRODUCTION OF EVIDENCE.

CHAPTER I.

INTRODUCTORY.

LAW,—Substantive and Adjective.—Law is commonly divided into Substantive Law, which defines rights, duties, and liabilities; and Adjective Law, which defines the procedure, pleading, and proof, by which the substantive law is applied in practice.

The rules of *procedure* regulate the general conduct of litigation from its initial to its final stage; the object of *pleading* is to ascertain for the guidance of the parties and the Court the material facts in issue in each particular case; *proof* is the establishment of such issues by proper legal means to the satisfaction of the Court. The first-mentioned term is, however, often used to include the other two.

PROOF, in this sense, is effected by—(*a*) evidence, (*b*) presumptions, (*c*) judicial notice, and (*d*) inspection.

(*a*) **Evidence** means the facts, testimony, and documents which may be legally adduced by the parties in order to determine the issues.

The word is, however, sometimes extended to all the means of proof above mentioned (Greenleaf, s. 1; Tay. s. 1); and sometimes restricted either to facts alone (Best, s. 11), or to testimony and documents as distinguished from facts (Steph. art. 1).

Direct and Circumstantial Evidence.—A distinction is also commonly taken between direct evidence, by which is meant the testimony of witnesses to a given fact; and circumstantial or presumptive evidence, by which is meant the testimony of witnesses to other facts, from which the fact in question may be inferred. The two forms are equally admissible, and the testimony, whether to the *factum probandum* or the *facta probantia*, is equally direct; but the advantage of the former is, that it contains only one source of error, fallibility of testimony, while the latter has, in addition, fallibility of inference. Little is to be gained from a comparison of their cogency, since both forms admit of every degree of probability, from the lowest to the highest (Hunter, Roman Law, 891, 892; Amos, Science of Jurisprudence, 333; Tay. ss. 65–69; Best, ss. 293–295; Steph. Introd. to the Indian Evidence Act; and General View of the Criminal Law; Whart. s. 8. And see *post*, "Relevancy").

(*b*) **Presumptions** are either of law or of fact.

Presumptions of law are arbitrary inferences expressly directed by law to be drawn from particular facts; and may be either *conclusive*, as that a child under seven is incapable of committing a felony; or *rebuttable*, as that a person not heard of for seven years is dead, or that a bill of exchange has been given for value.

Presumptions of fact are inferences which the mind naturally and logically draws from given facts, without the help of legal direction. They are always rebuttable (see *post*, "Relevant Facts, p. 47, *et seq.*).

(*c*) **Judicial Notice** is the cognizance taken by the Court itself of certain matters which are so notorious, or clearly established, that evidence of their existence is unnecessary (*post*, p. 7).

(*d*) **Inspection.**—Inspection has been defined as a substitution of the eye for the ear in the reception of evidence (Whart. s. 345), and is generally required or allowed whenever it will assist the tribunal in arriving at a decision. Valuable inferences are frequently derived through this channel from the demeanour of witnesses, the condition of premises in dispute in an action, or the instruments used in committing a crime.

When the issue is as to the state of a chattel, however,

its production is not primary evidence in the sense applied to documents; non-production is merely matter of comment, and does not exclude other evidence (R. *v.* Francis, 12 Cox 612; Lucas *v.* Williams, 1892, 2 Q. B. 113). Indeed, in an action for injury to the plaintiff's hand, Wright, J., declined, in the absence of the doctor, and, unless by consent, to allow the jury to view the hand (Curtler *v.* Lond. Tram. Co., Times, Feb. 13, 1891).

[Tay. ss. 554–566; Best, ss. 196, 197; O. 50, rr. 3–6; and see R. *v.* Martin, 12 Cox 204.]

PROOF IN CIVIL AND CRIMINAL CASES.—The rules of proof are in general the same in civil and criminal proceedings, but the following points of difference must be noted:—

(1) The provisions relating to *confessions, dying declarations, character*, and *the incompetency of parties as witnesses* are wholly, or partially, peculiar to the criminal law.

(2) Civil issues may be proved by a *preponderance of evidence;* criminal issues, whether arising in criminal or civil proceedings, must be proved *beyond a reasonable doubt* (Tay. s. 112; Steph. art. 94).

FUNCTIONS OF JUDGE AND JURY.—Matters of law are determinable by the judge, matters of fact (with the exceptions mentioned below) by the jury.

Questions as to the production and admissibility of evidence belong to the former class; questions as to its credibility and weight, to the latter. Whether there is *any* evidence, therefore, is for the judge; whether there is *sufficient* evidence is for the jury. But it is the duty of the judge to explain, and of the jury to regard, any specific rule or presumption of law which may affect the facts, testimony, or documents adduced.

The following matters of fact are determinable by the judge:—

(1) The question of reasonable and probable cause in actions for malicious prosecution or false imprisonment.

(2) Generally, the question of what is a reasonable time for the performance of an act.

(3) The existence of all facts on which the admissibility of evidence depends (*post*, p. 92).

(4) The construction of written documents is for the

Court; the construction of peculiar or technical terms is for the jury.

[Tay. ss. 23–48; Best, ss. 80–82; Powell, 10–25.]

OBJECTIONS TO EVIDENCE AND NEW TRIALS.

(*a*) Civil Cases.

Trials by Judge and Jury.—Subject to O. 39, r. 6, *infra*, if admissible evidence has been rejected by the judge, the injured party is entitled to a new trial, provided he formally tendered such evidence to the judge at the trial and requested the latter to make a note of the point (Campbell *v.* Loader, 34 L. J. Ex. 50).

So, also, if inadmissible evidence has been received, provided it was formally objected to at the trial. But the grounds of objection must be distinctly stated, and no others can afterwards be raised (Williams *v.* Wilcox, 8 A. & E. 314; Ferrand *v.* Milligan, 7 Q. B. 730; Bain *v.* Whitehaven Ry. Co., 3 H. L. C. 1; McDougal *v.* Knight, 14 App. Cas. 194).

Moreover, even if the specific objections prevail, yet should the evidence be admissible for any other purpose, a new trial will not be granted; the proper course being for counsel at the trial to ask the judge to explain the limits of the evidence to the jury, and if he refuse, then to impeach his decision on the ground of misdirection (Irish Society *v.* Derry, 12 C. & F. 641; Milne *v.* Leisler, 7 H. & N. 786, *per* Pollock, C.B.).

Trials by Judge Alone.—If admissible evidence has been rejected, the same rule holds as above.

If inadmissible evidence has been received (whether with or without objection) it is the duty of the judge to reject it when giving judgment; and if he has not done so, it will be rejected on appeal, as it is the duty of Courts to arrive at their decisions upon legal evidence only (Jacker *v.* I. C. Co., 5 Times L. R. 13).

New Trials will not, however, under any circumstances, be granted for the improper admission or rejection of evidence unless the Court to which the application is made is of opinion that some *substantial wrong or miscarriage* has been thereby occasioned in the trial (O. 39, r. 6).

[Tay. ss. 1881, 1882; Best, s. 82; Ros. N. P. 273, 274; Chitty's Archbold, 730.]

(*b*) Criminal Cases.

In criminal cases, the only remedy for the improper reception or rejection of evidence is that given by 11 & 12 Vict. c. 78, which provides (s. 1) that when any person has been *convicted* of a crime before any Court of Oyer and Terminer, Gaol Delivery, or Quarter Sessions, the judge before whom the case shall have been tried *may*, in his discretion, reserve "*any question of law which shall have arisen on the trial*" and state the same, together with the special circumstances under which it arose, in a case for the consideration of the Court for Crown Cases Reserved.

If this has been done, and it appears that any evidence was improperly received or rejected, the conviction will be set aside. This rule applies whether the prisoner was defended or not; whether his counsel objected or not; and notwithstanding there was sufficient evidence, without that in dispute, to warrant the conviction (R. *v.* Gibson, 18 Q. B. D. 537). Where, however, the jury, although allowed in the first instance to consider the inadmissible evidence, have been directed by the judge, before verdict, to disregard it, the conviction will not be disturbed (R. *v.* Crooks (C. C. R.), L. T. vol. lxxxvii. p. 188).

There is a conflict of decision as to when a question of law may be considered as having "*arisen on the trial.*" In R. *v.* Sullivan, 24 L. R. I. 191 (1889), and R. *v.* Coll, *ibid.* p. 522, the Irish Court of Criminal Appeal held that objections to evidence not taken at the trial could not be afterwards entertained. So, in R. *v.* Clark, L. R. 1 C. C. R. 54 (1866), where the prisoner had pleaded guilty and been convicted, but after the trial it was doubted whether the indictment, though good, was supported by the evidence, the Court held it had no jurisdiction as the question had not "arisen on the trial." In R. *v.* Brown, 24 Q. B. D. 357 (1890), however, where the prisoner had pleaded guilty and been convicted, but it was afterwards doubted whether the indictment was good, the Court unanimously held it was not necessary that a question of law existing at the trial, should be *taken* thereat, and R. *v.* Clark (*supra*), though distinguished, was not approved. See, also, R. *v.* Gibson, *supra*; R. *v.* Moore, 8 Times L. R. 287; Ros. Cr. Ev. 219–223.

CHAPTER II.

MATTERS OF WHICH EVIDENCE IS UNNECESSARY.

No evidence is required of matters which are either—(*a*) admitted for the purposes of the trial, or (*b*) judicially noticed.

(*a*) Admissions for Purpose of Trial.

Admissions for the purpose of dispensing with proof at the trial may be made as follows:—

In **Civil Cases**, (1) By the pleadings; (2) Pursuant to notice under O. 32, rr. 1–5 (such admissions are only available for the particular person giving, and cause affected by, the notice, and the admissions may be amended or withdrawn on terms: (r. 4); (3) By agreement, or otherwise, before, or at, the trial, and with reference thereto by the parties or their agents. (An admission made by counsel at the trial for the purpose of dispensing with proof is conclusive, and the judge should not hear evidence on the point: Urquhart *v.* Butterfield, 37 Ch. D. 357.)

Admissions of this kind are not received as a substitute for proof in divorce proceedings, on account of the danger of collusion (*e.g.*, an admission of adultery made by the respondent in court: Yetts *v.* Yetts, *per* Hannen, J., 22 Feb. 1890; though a similar admission made by the co-respondent through his counsel was received as being against interest by the same judge in Le Marchant *v.* Le Marchant, 24 W. R. 374); nor in probate suits (Hutley *v.* Grimstone, 5 P. D. 24); nor in peerage claims, for there may be a joint-interest to misstate (Hubback, Ev. of Succ. 97).

Such admissions must be distinguished from those which are receivable as evidence on the trial; it is doubtful whether the former amount to more than a mere waiver of proof, and whether if a party seeks to have any inference drawn from

facts so admitted, he must not prove them to the jury (Ros. N. P. 78; for admissions of the latter kind, see *post*, p. 121).

[Tay. ss. 724^{A}–724^{F}; Annual Practice, notes to O. 32; Powell, 289–294; Ros. N. P. 72–79; Steph. art. 60.]

In **Criminal Cases**, except by a plea of guilty, no such admissions are allowed in cases of felony; and in R. *v.* Thornhill, 8 C. & P. 575, the same rule was applied to a case of misdemeanour (Steph. 60).

(*b*) Judicial Notice.

It is the duty of the Court to take judicial notice of the following matters:—

(1) **The Law and Customs of the Land.**—Courts will recognise, without proof, the Statute and Common Law; the rules of equity and of maritime, ecclesiastical, and international law; the rules made by the Lord Chancellor, or other authorized officials, under various Acts (*e.g.*, the Bankruptcy Rules under the Act of 1883, s. 123); the Articles of War (but not the book of Rules and Regulations for the Government of the Army: Bradley *v.* Arthur, 4 B. & C. 304); the jurisdiction and rules of procedure of the Supreme Court of Justice (the proceedings and practice of inferior courts are, unless regulated by statute, only noticed by themselves, and not by each other, or by the superior courts); the practice of conveyancers (*Re* Rosher, 53 L. J. Ch. 722); the rules of average adjustment (Lohre *v.* Aitchison, 3 Q. B. D. 538, 561); the general customs of the country (*e.g.*, the rules of the road on land or sea); and all customs which have been frequently established in the superior courts (*e.g.*, the custom of hotel-keepers to hold their furniture on the hire-purchase system: Crawcour *v.* Salter, 18 Ch. D. 30; or of horse-dealers to receive horses on sale or return: *In re* Florence, 10 Ch. D. 591; and the fact that a custom has been frequently proved may be shown by reported cases: *In re* Mathews, 1 Ch. D. 505); or which have been certified to and recorded in any of such courts (*e.g.*, the custom of foreign attachment as certified by the Recorder of London). (Steph. art. 58 (4), *note;* the old rule was that a court only noticed customs certified to itself.)

Notice, however, will not be taken of Orders in Council,

(A.-G. *v.* Thickstone, 8 Price 89); or of transactions in parliamentary journals (R. *v.* Knollys, 1 Ld. Ray. 10, 15; though copies are now admissible if purporting to be printed by the official printer: (8 & 9 Vict. c. 113, s. 3; 31 & 32 Vict. c. 37; or by H.M.'s Stationery Office: 45 & 46 Vict. c. 9, s. 2); or of Scotch, colonial, or foreign law, which, as will be hereafter seen, must be proved as a fact by skilled witnesses, except in those tribunals which, forming a common forum of appeal from several jurisdictions, will, in appeals from one, judicially notice the law of the others (Cooper *v.* Cooper, 13 App. Cas. 88; in such cases that which was a question of fact in the court below to be proved by evidence becomes on appeal a question of law to be judicially noticed).

(2) **Constitutional, Political, and Administrative Matters.** —Judicial notice will be taken of the accession and demise of the Sovereigns of this country; of the existence and titles of all other recognised Sovereign Powers (the judges being bound to know whether a State has been recognised or not: Taylor *v.* Barclay, 2 Sim. 213); of the principal officers of State and heads of departments, whether past or present (Whaley *v.* Carlisle, 17 Ir. L. R. N. S. 792); of the judges of the Supreme Court (but not, it seems, of those of inferior courts: Van Sandau *v.* Turner, 6 Q. B. 773, 786); and of marshals and sheriffs (though not of their deputies: Grant *v.* Bagge, 3 East 128).

The Court will also notice the privileges of its own officers and solicitors (Stokes *v.* Mason, 9 East 426; Walford *v.* Fleetwood, 14 M. & W. 449); but not their names (Frost *v.* Hayward, 10 M. & W. 673; in Hunt *v.* Fineburgh, Times 8 Dec. 1888, however, Huddlestone, B., took judicial cognizance that one of the solicitors to the record had been suspended).

So, judicial notice will be taken of a war in which this country is engaged (R. *v.* de Berenger, 3 M. & S. 67); though not, it seems, of one between foreign Powers (Dolder *v.* Huntingfield, 11 Ves. 292); and generally of all public matters affecting the government of the country.

(3) **Territorial and Geographical Divisions.** — Judicial notice will be taken of the extent of British jurisdiction (see 6 & 7 Vict. c. 94); of the territorial and administrative divisions of the country into counties, towns, parishes, &c.;

(Deybel's case, 4 B. & A. 242; R. *v.* Isle of Ely, 15 Q. B. 827; R. *v.* St. Maurice, 16 Q. B. 908); and of the geographical position and general names of districts and parts of the sea as marked in the Admiralty charts (*e.g.*, that the term "The St. Lawrence" applies to both the gulf and river of that name: Birrell *v.* Dryer, 9 App. Cas. 345, *per* Lord Blackburn).

But notice will not be taken of the geographical situation or boundaries of particular places (Tay. s. 14; in Kearney *v.* King, 2 B. & Ald. 303, the Court refused to notice that Dublin was in Ireland; *sed qu.*, and this appears in several statutes).

(4) **The Official Gazettes** of London, Edinburgh, and Dublin will be noticed on their mere production (31 & 32 Vict. c. 37, ss. 2 and 5); but the entire Gazette and not a mere cutting must be produced (R. *v.* Lowe, 15 Cox 286).

(5) **Official Seals and Signatures.**—Judicial notice will be taken of the various royal and duchy seals (but *quære* as to the Royal sign manual, or the signatures of the Lords of the Treasury: Tay. s. 14); the seals of the superior courts, central office and its departments (O. 61, rr. 1, 2, 7, R. S. C. 1883); and principal and district registries (Jud. Act, 1873, s. 61); the signatures of the judges of the superior courts to any judicial or official document (8 & 9 Vict. c. 113, s. 2); the seal and signatures of the judges and registrars in bankruptcy (Bpy. Act, 1883, s. 137; and of the persons authorized by the judge to administer oaths therein, Bpy. Rules, 50); all other seals allowed by statute to be used by any public office or body (*e.g.*, the Local Government, Poor Law, and Public Health Boards; the Land, Railway, Prisons, Public Works, and Charity Commissioners; the Patent and Record Offices, &c.); and the Seal of the Corporation of London.

And, under the Commissioners for Oaths Acts, 1889 and 1891 (which replace O. 38, r. 6), judicial notice is required to be taken of the seals and signatures to affidavits and similar documents required for the purpose of any court or matter in England, or for the registration of any instrument in the United Kingdom, of all persons authorized (otherwise than by the law of any foreign country) to administer oaths, &c., in any place out of England. Such persons are, in Scotland, Ireland, the Channel Islands, or H.M.'s colonial or

foreign dominions—any judge, court, notary public, or other person lawfully authorized (O. 38, r. 6); and in foreign countries—the various diplomatic and consular agents (C. O. Act, 1889, s. 6).

(6) **Notorious Facts.**—The Court will take judicial notice of facts which are notorious—*e.g.*, the ordinary course of nature; the standards of weight and measure (Holkin *v.* Cooke, 4 T. R. 314); the public coin and currency (Kearney *v.* King, 2 B. & Ald. 303; and its difference of value in early and modern times: Bryant *v.* Foot, L. R. 3 Q. B. 497); the meaning of common words and phrases (*e.g.*, that beans are a species of pulse: R. *v.* Woodward, 1 Moo. C. C. 323); the difference of time in places east and west of Greenwich (Curtis *v.* Marsh, 4 Jur. N. S. 112); the fact that the universities are national institutions for the advancement of learning and religion (*Re* Oxford Rate, 8 E. & B. 184).

The Court will also judicially notice the almanac annexed to the Common Prayer Book as being part of the law of the land (Collier *v.* Nokes, 2 C. & K. 1012; Tutton *v.* Darke, 5 H. & N. 647—*e.g.*, the number of days in a given month: 1 Rol. Ab. 824; or that a certain day of a month was a Sunday: Hanson *v.* Shackleton, 4 Dowl. 48); but not matters not therein contained—*e.g.*, the time of sunset on a particular day (Tutton *v.* Darke, *sup.*; Mr. Taylor doubts this decision).

Refreshing Memory of Judge.—When in doubt as to any matter to be noticed, the judge may refer for information to appropriate sources—*e.g.*, to public histories, almanacs, and dictionaries; or to the officials of a public department. He may also, it seems, refuse to take judicial notice of the given matter unless the party interested produce the necessary books of reference (Tay. s. 21; Steph. art. 59).

[Tay. ss. 4–21; Ros. N. P. 80–84; Best, ss. 253, 254; Powell, 319–324; Steph. art. 58; Whart. ss. 276–340.]

CHAPTER III.

MATTERS TO WHICH EVIDENCE MUST BE CONFINED. VARIANCE AND AMENDMENT. THE BEST EVIDENCE.

EVIDENCE MUST BE CONFINED TO THE ISSUE.—Evidence must be directed and confined to the proof or disproof of the issues, as settled by the *pleadings*, and supplemented (where necessary) by the *particulars*.

The **pleadings** must contain, and contain only, a statement in a summary form of the material facts on which the parties rely for their claim, or defence, but not the evidence by which they are to be proved (O. 19, r. 4); or any matter of fact which the law presumes in a party's favour, or as to which the burden of proof lies on the other side, unless the same has first been specifically denied (O. 19, r. 25).

The object of **particulars** (which are now usually indorsed on the pleadings) is to limit the generality of the latter, so as to inform the parties precisely of the case they have to meet, and thus prevent surprise at the trial. Where particulars have been ordered, but not delivered, the proper course is not to exclude the evidence, but to postpone the hearing (O. 19, rr. 6, 7; O. 36, r. 37; Ros. N. P. 88–90; Ros. Cr. Ev. 194, 195; Archb. Pr. 380–393).

VARIANCE AND AMENDMENT.—Formerly the parties could only succeed strictly *secundum allegata et probata*; if the proofs differed from the allegations, the variance was fatal. Now, however, though the case made at the trial must not substantially differ from that appearing on the record, very large powers of amendment are conferred upon the Court with the object of preventing a miscarriage of justice.

In **Civil Cases** the Court may at any time, on just terms, allow all such amendments in the pleadings as are necessary to determine the real questions in dispute between the

parties (O. 28); and, similarly, the particulars may be amended, or a further and better statement ordered on proper terms (O. 19, r. 7; Ros. N. P. 88–90).

In **Criminal Cases**, also, names, dates, and circumstances, when not material to the merits of the case, but the misstatement of which was formerly fatal, may now be amended under 14 & 15 Vict. c. 100, ss. 1, 2, 9, 12. So, under the Summary Jurisdiction Act, 1848, s. 1, no objection can be raised to any information, complaint, or summons, on the ground of any defect in substance or in form, or variance between such information, &c., and the evidence produced, though in the latter case if the defendant has been misled the case may be adjourned (Ralph *v.* Hurrell, 44 L. J. M. C. 145; Rodgers *v.* Richards, 1892, 1 Q. B. 555).

[Tay. ss. 217–296; Ros. N. P. 90–93; Powell, 510–526; Best, ss. 278–291; Ros. Cr. Ev. 194, 195.]

THE BEST EVIDENCE MUST BE GIVEN.—The maxim that "*the best evidence must be given of which the nature of the case permits*," is often regarded as the fundamental principle upon which the rules regulating the admission and exclusion of evidence are based. It is extremely doubtful, however, whether the law of evidence has been perceptibly moulded by any principle so philosophical and invariable. At all events, in the present day, the maxim affords but little practical guidance.

It is not, in general, true that the best evidence *must* be given; though its non-production may be matter for comment, or affect the weight of that which is produced. Thus, circumstantial evidence is as admissible as direct. Words spoken may be proved by third persons, though the speaker is in court and might be called. So, of handwriting: it is not necessary to call either the writer, or some one who saw the document written; the opinion of a witness who but once, and many years before, has seen the party sign, is equally admissible, though its weight may be *nil*. Even on an indictment for forgery, the prosecutor is not an essential witness to disprove either the handwriting or his authority to sign (R. *v.* Hurley, 2 M. & Rob. 473). Nor, to disprove consent, need the party alleged to have consented be called. Again, payment to a deceased person may be proved either by the "best evidence"—*i.e.*, the

oral testimony of the payer—or the hearsay receipt of the deceased. In short, all admissible evidence is, in general, equally receivable.

It is not even true that the best evidence of which the nature of the case permits *may* be given—*e.g.*, hearsay, though often the best obtainable evidence, is generally inadmissible.

The maxim has its chief application to the proof of documents; and, indeed, is now practically equivalent to the rule which demands that the contents of a document must, in the absence of legal excuse, be proved by the production of the writing itself, and not by evidence which is clearly substitutionary in its nature—*e.g.*, oral testimony, or a copy. Even here, however, there are large exceptions to its truth. Thus, in the case of public documents, duly authenticated copies are the proper, and sometimes (*e.g.*, probates of wills of personalty) the only admissible means of proof; while in the case of private documents, the extra-judicial admissions of a party are considered as primary evidence, and thus equivalent in admissibility, though not, of course, in weight, to the production of the original. Even where secondary evidence of documents may be given, the best or worst is equally receivable, there being, technically speaking, no degrees.

[Best, ss. 87–92, *note* to Chamberlayne's Amer. ed.; Tay. ss. 391–427; Powell, 62–69.]

CHAPTER IV.

BURDEN OF PROOF. RIGHT TO BEGIN AND REPLY. COURSE OF EVIDENCE.

BURDEN OF PROOF.—The general rule, founded on reason and justice, is, that "he who asserts must prove." As applied to judicial proceedings, however, the phrase has two distinct and frequently confused meanings: (1) The burden of proof as a matter of law and pleading—the burden, as it has been called, of *establishing a case*, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) The burden of proof in the sense of *introducing evidence* (Chamberlayne's Best, s. 265, *note*).

The burden of proof, in the former sense, rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting under any circumstances whatever. If, when all the evidence, by whomsoever introduced, is in, the party who has this burden has not discharged it, the decision must be against him (Pickup *v.* Thames Ins. Co., 3 Q. B. D. 594; Chamberlayne's Best, s. 265, *note;* 1 Greenleaf (14th ed.), s. 74, *note;* Central Bridge Corporation *v.* Butler; 2 Gray (68 Mass.) 524; Heinemann *v.* Heard, 62 N. Y. 448).

It is in the second sense that the term must be understood in applying the following rules; and the burden of proof in this sense may shift constantly, according as one scale of evidence or the other preponderates.

The *onus probandi* in this sense rests upon the party who would fail if *no evidence at all, or no more evidence, as the case may be*, were given on either side; *i.e.*, it rests, *before*

evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, *after* evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced.

In deciding which party asserts the affirmative, however, regard must be had to the substance of the issue, and not merely to its grammatical form, which latter the pleader can frequently vary at will. The meaning of the rule is, that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, whether as claim or defence, the proof of such allegation rests on him (Abrath *v.* N. E. Ry., 11 Q. B. D. 440, *per* Bowen, L.J.); though, of course, a negative allegation must not be confounded with the mere denial of an affirmative one.

When the allegation is affirmative both in substance and form, the case is simple. Thus, if A. assert that he has sold goods to B., or that B. has published a libel concerning him, he must, of course, prove the contract or tort. Where, however, there is an opposition, the onus is not always so easy to determine. The following are common examples of averments which are affirmative in substance, although negative in form:—A claim against a tenant for not repairing according to covenant (Soward *v.* Leggatt, 7 C. & P. 613); against an architect for not building according to specification (Smith *v.* Davies, 7 C. & P. 307); against a merchant for not loading pursuant to charter-party (Ridgeway *v.* Ewebank, 2 M. & Rob. 217); against a solicitor for not using due diligence (Shilcock *v.* Passman, 7 C. & P. 291); against a horse-dealer, that a horse sold by him with a warranty was unsound (Osborn *v.* Thompson, 9 C. & P. 337); against a prosecutor for instituting proceedings without reasonable and probable cause (Abrath *v.* N. E. Ry., *supra*).

The rule that the party who affirms must prove, holds equally as to matters which are not the subject of express allegation, but relate merely to the admissibility of evidence; *e.g.*, if either party desire to give secondary evidence of a lost document, the burden of proving the loss is upon him (Steph. art. 97).

There are commonly said to be *two cases* in which the burden of proof (in the sense of introducing evidence) does

not rest upon the party substantially asserting the affirmative; or which, if they occur during the trial, will operate to shift such burden to his opponent.

(1) **When there exists a disputable presumption of law in favour of a party,** it lies upon his adversary to rebut such presumption.

The burden of proof, indeed, may be shifted not only by rebuttable presumptions of law, but by presumptions of fact of the stronger kind, or by any species of evidence sufficient to raise a *primâ facie* case (Best, s. 273; The Indus, 12 P. D. 46). And where there are conflicting presumptions, the case is the same as if there were conflicting evidence (Steph. art. 95).

Thus, a party suing on a bill of exchange need not allege, or at the outset prove, consideration (O. 19, r. 26); nor when suing upon any contract need he allege, or at the outset prove, the defendant's *full age* (Hartley *v.* Wharton, 11 A. & E. 934); or *sanity* (Sutton *v.* Sadler, 26 L. J. C. P. 284; though *aliter* in case of a disputed will: Smee *v.* Smee, 5 P. D. 843), for the presumption is *primâ facie* in favour of such conditions. So, though a party asserting another's *death* must prove it, yet, if he give evidence that such person has not been heard of for seven years, the burden of disproof is shifted to his adversary, for the law presumes death in such a case. So the *legitimacy* of a child born during wedlock is presumed; but if its parents are shown to have been judicially separated more than nine months before its birth, the presumption is reversed (Hetherington *v.* Hetherington, 12 P. D. 112).

Similarly, the burden of proving that a party standing in a fiduciary or confidential relation to another has acted *bonâ fide* in a transaction with that other, lies upon the dominant party (Tay. ss. 151–153; Steph. art. 97[4]).

(2) **Where the subject-matter of a party's allegation (whether affirmative or negative) is peculiarly within the knowledge of his opponent,** it lies upon the latter to rebut such allegation (Tay. ss. 376, 377; Best, ss. 274–277; Powell, 315–317).

The principle of this exception has been recognised chiefly in the older cases and by the Legislature. Thus, the burden of proving authority, consent, qualification, lawful excuse, and similar defences in criminal cases, has in many

instances been cast by statute upon the defendant as lying peculiarly within his knowledge. So the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 39, sub-s. 2), dispenses with disproof by informants, or complainants, of "any exemption, exception, proviso, excuse, or qualification" which would be in favour of the defendant.

In the absence of statutory provision, however, the better opinion now certainly is that *some primâ facie* evidence must be given by the plaintiff or prosecutor in order to cast the burden of disproof on the other side. It has frequently been held that the difficulty of proving a fact peculiarly known to an opponent, may affect the *quantum* of evidence demanded in the first instance, but does not shift the entire burden of proof (Doe *v.* Whitehead, 8 A. & E. 571; Elkin *v.* Janson, 13 M. & W. 662; Tolman *v.* Portbury, L. R. 5 Q. B. 288; Wedgwood *v.* Hart, 2 Jur. N. S. 288; Price *v.* Worwood, 4 H. & N. 512; Abrath *v.* N. E. Ry., 11 Q.B.D. 440; but see Huggins *v.* Ward, 21 W. R. 914).

[Tay. ss. 364-377; Best, ss. 265-277; Ros. N. P. 94-96; Powell, 307-317; Steph. arts. 93-97[4]; Whart. ss. 353-371; Beven on Negligence, 98-127.]

RIGHT TO BEGIN.—The right to begin, which may prove a benefit or burden according to the strength or weakness of a party's case, is partially, but not wholly, determined by the burden of proof.

In one sense, the plaintiff always begins, for without an exception the pleadings are opened by him and not by the defendant. The following are the generally accepted rules as to the right to begin in the sense of opening the case to the jury:—

(1) Where the onus of proving any *one* of the issues, however numerous they may be, rests upon the plaintiff, and he will undertake to give evidence upon it, he is entitled to begin.

(2) Although there may be *no* issues lying upon the plaintiff, yet he is entitled to begin in all actions in which he claims *substantial* and *unliquidated damages* (*e.g.*, actions founded on libel, slander, injuries to the person, covenant, or assumpsit).

(3) If the onus of proving all the issues lies on the defendant, he is, subject to the exception just mentioned,

entitled to begin. But his mere admission at the *trial* of the plaintiff's whole *primâ facie* case will not be sufficient to give him this right, if he might have made the admission by his *pleadings* (Pontifex *v.* Jolly, 9 C. & P. 202; Price *v.* Seaward, Car. & M. 23; Tay. s. 379; Ros. N. P. 279).

In probate suits, the party propounding the will begins, if either its validity or the competency of the testator be impeached (Smee *v.* Smee, 5 P. D. 84); but if these points are admitted, and fraud, undue influence, a later will (Hutley *v.* Grimstone, 5 P. D. 24), or a codicil (even though itself impeached for testamentary incapacity, fraud, or undue influence: Riding *v.* Hawkins, 14 P. D. 56) be pleaded, the party so pleading begins.—On petitions for revocation of patents, the defendant is entitled by statute to begin (46 & 47 Vict. c. 57, s. 26). In criminal cases, the prosecution always begins.

If an erroneous ruling as to the right of beginning has occasioned *substantial injustice*, the injured party will be entitled to a new trial (Ashby *v.* Bates, 15 M. & W. 589; Brandford *v.* Freeman, 5 Exch. 734).

[Tay. ss. 378–384; Ros. N. P. 278–282; Best, ss. 637–639; Best, Right to Begin and Reply. And see L. T. vol. xlv. pp. 196, 219, on the Right to Begin; Chitty's Archbold, 627–631.]

COURSE OF EVIDENCE.—Where there is only *a single issue* to be tried, the party beginning must exhaust his evidence in the first instance, and may not split his case by first relying on *primâ facie* proof, and, when this has been shaken by his adversary, adducing confirmatory evidence (Jacobs *v.* Tarleton, 11 Q. B. 421; Wright *v.* Wilcox, 9 C. B. 650; Green *v.* Sevin, 13 Ch. D. 589; Barker *v.* Furlong, 1891, 2 Ch. 172).

Where there are *several issues*, any one of which lies upon the plaintiff, he may at his option go into his whole case (both original and rebutting) in the first instance; or (as is more usual) merely adduce evidence on these issues which lie upon him, reserving the right to call rebutting evidence should his opponent make out a *primâ facie* case. He may not, however, divide the rebutting, any more than the original case (Jackman *v.* Jackman, 14 P. D. 62).

Evidence in reply must be directed to rebutting the defendant's case and not to confirming the plaintiff's own (see cases *supra*; and as to affidavits, Gilbert *v.* Comedy Co. 16 Ch. D. 594); though where the plaintiff has been taken by surprise such evidence will generally be allowed (Bigsby *v.* Dickenson, 4 Ch. D. 24; Rogers *v.* Manley, 42 L. T. 584; Budd *v.* Dunn, 29 W. R. 192).

[Tay. ss. 386, 387; Ros. N. P. 271–274.]

RIGHT TO REPLY.—(*a*) **Where Opponent calls Witnesses.**—The right to begin entitles a party to reply in all cases in which his adversary adduces evidence to the jury. Where, however, the plaintiff reserves his rebutting case until after the defendant has called his evidence, the latter has a *special* reply on the plaintiff's rebutting evidence, though the plaintiff has the *general* reply upon the whole case.

Where the only evidence adduced by a defendant is to *character*, the right to reply upon such evidence, though it exists, is rarely enforced; and evidence which is merely addressed to the *judge* (Harvey *v.* Mitchell, 2 M. & R. 366; Dover *v.* Maerstaer, 5 Esp. 92), or comments which are made upon a document used only to refresh the memory of an adversary's witness, even though reference be made to parts not looked at by such witness (Pullen *v.* White, 3 C. & P. 434), will not entitle the opposite party to reply.

Joint Defendants.—Where several prisoners are jointly indicted, some calling witnesses and others not, the prosecution replies to the former, but the latter address the jury last (R. *v.* Kain, 15 Cox 388; R. *v.* Burns, 16 Cox 195; although the practice is not altogether uniform: R. *v.* Trevelli, 15 Cox 289; Ros. Cr. Ev. 205). So, with joint defendants in tort, he who calls no witnesses has the reply (Hornsey *v.* Platen, L. T. June 29, 1889). If co-defendants rely on the same defence, however, even though they appear by separate solicitors, they are only entitled to be heard by one counsel; while, if they rely on separate defences, they are entitled to separate addresses even though they appear by the same solicitor (Chitty's Archbold, 634, 635).

(*b*) **Where Opponent calls no Witnesses.**—When the

party who began has closed his case, his opponent must announce whether he will adduce evidence or not (Civil Cases, O. 36, r. 36; Criminal Cases, 28 & 29 Vict. c. 18, ss. 1 and 2); if he decide in the negative, the party beginning is entitled to address the jury a second time for the purpose of summing up his evidence, but his opponent has the reply, except in the following cases:—

(1) In public prosecutions, instituted by the Crown, the law-officers have the privilege of a general reply although the defendant calls no evidence (Tay. s. 390; Steph. Cr. Pro. art. 291; The Right to Reply in Crown Prosecutions, Law Mag. Feb. 1881).

The same privilege exists in revenue cases in which the Crown is concerned; but it is doubtful how far it extends to prosecutions instituted by the various public departments, or whether it applies to counsel merely representing the law-officers. (See Warburton, L. C. Cr. Law. 240–242).

(2) Where a prisoner makes a statement to the jury (which he is entitled to do, whether defended or not provided he calls no witnesses: R. *v.* Milhouse, 15 Cox 622; and in R. *v.* Maybrick this was allowed even though witnesses were called) the prosecution has the right to reply. There is a conflict of practice, however, as to whether the statement must be made *before* (R. *v.* Doherty, 16 Cox 306; Ros. Cr. Ev. 205) or *after* (R. *v.* Shimmin, 15 Cox 122; R. *v.* Milhouse, *supra*) his counsel's speech.

(3) Formerly, if the defendant's counsel opened new facts without proof, it was in the discretion of the judge to allow a reply. Now, however, counsel would not be allowed to take this course (Civil Cases, Darby *v.* Ouseley, 1 H. & N. 1; Crim. Cases, resolution of the judges, cited Ros. Cr. Ev. pp. 203–204).

[Tay. ss. 589–590; Ros. N. P. 282–284; Ros. Cr. Ev. 203–206; Best, Right to Begin and Reply; Chitty's Archbold, 642–645.]

BOOK II.

ADMISSIBILITY OF EVIDENCE.

PART I.—FACTS.

CHAPTER V.

FACTS IN ISSUE. RELEVANCY. ADMISSIBILITY.

THE facts which may be proved in a judicial inquiry are *facts in issue; facts relevant to the issue;* and in certain cases *hearsay, opinions, and judgments* as to such facts.

FACTS IN ISSUE are those facts which are necessary by law to establish the claim, liability, or defence, forming the subject-matter of the proceedings; and which, either by the pleadings or by implication, are in dispute between the parties (O. 19, rr. 4, 15; Steph. art. 1). Facts in issue are determinable primarily by the substantive law, and secondly by the pleadings.

FACTS RELEVANT TO THE ISSUE are facts which tend, either directly or indirectly, to prove or disprove a fact in issue, or some relevant fact. Thus, facts which merely constitute a link in the chain of proof, or affect the credit of a witness, or the admissibility of a document are relevant.

Legal and Logical Relevancy.—Legal relevancy is for the most part based upon logical relevancy, or that connection between events which, in the ordinary course of experience, is found to render one probable from the existence of the other.

The two theories, however, do not wholly coincide. Thus, certain classes of facts (*e.g.*, similar occurrences, character, opinion) which in ordinary life are relied upon as rendering other facts probable—*i.e.*, are logically relevant to them—the law (with certain exceptions) rejects, as not possessing a sufficient degree of probative force to form the basis of judicial decisions—*i.e.*, are legally irrelevant; on the other hand, numerous facts (*e.g.*, those necessary to be proved to admit secondary evidence of a document) are considered legally relevant although they have no logical bearing on the issue (Steph. Dig. p. xii).

It does not seem possible to give any general test of relevancy or to satisfactorily classify relevant facts; and the rules on the subject in the two first editions of Mr. Justice Stephen's well-known Digest (modified from those in the Indian Evidence Act), which contain the ablest attempt on the subject, and were framed on the supposition that relevancy means "the connection of events as cause and effect," have not met with general acceptance.

The rules are as follows—"Facts whether in issue or not are relevant to each other when one is, or probably may be, or probably may have been—

> the cause of the other; the effect of the other; an effect of the same cause; cause of the same effect;
>
> or when one shows that the other must or cannot have occurred, or probably does or did exist, or not; or that any fact does or did exist, or not, which in the common course of events would either have caused or been caused by the other;
>
> provided that such facts do not fall within "certain exclusive rules," or that they do fall within the exceptions to such rules.

The main objections urged to their adoption were (1) that they did not sufficiently distinguish between the logical and the legal theory of relevancy; (2) that it is practically as difficult to determine what is a "cause," as what is "relevant," the very object of many trials being to decide whether given facts are, or are not, the result of others; (3) that the rules themselves were expressed with such almost necessary vagueness, as to be of little practical assistance. In the later editions of the Digest, the theory of causation as a test of relevancy is, in terms, at least, abandoned; and the sub-

ject is treated in a less technical and more satisfactory manner.

ADMISSIBILITY.—*Relevancy* must be distinguished from *admissibility*, of which, though the primary, it is by no means the sole condition. A fact may be legally relevant (or even in issue) and yet, on account of objections of form, or on grounds of convenience or policy, it may be inadmissible—*e.g.*, a privileged communication, or State secret. Moreover, there are three important classes of facts dealt with by the law of evidence—viz, hearsay, opinions, and judgments, which are of a two-fold nature, and as to which it is often necessary to consider not merely the relevancy of the fact asserted, but also the accuracy or other quality of the assertion made, which is a matter determinable by rules other than those of relevancy. It is more common, therefore, to confine the term relevancy to facts (including therein all statements whose existence simply but not whose truth is material, see *post*, pp. 117–119) and to regard the term *admissibility* as embracing in addition the various conditions regulating the reception of hearsay, opinions, and judgments, as well as of witnesses and documents.

The terms *relevant*, *pertinent*, *material* are often used interchangeably. The latter term is, however, sometimes applied indiscriminately to facts in issue and relevant facts.

The admissibility of facts in issue, and of the chief classes of relevant facts commonly tendered in evidence, will be considered in the remaining chapters of Part I.

[Greenleaf, ss. 50–52; Tay. ss. 63–85, 298–316; Best, ss. 251, 252 (also note to these sections in Chamberlayne's Amer. ed.); Powell, 527, 528; Steph. Introd. to Ind. Ev. Act, and Dig. arts. 1, 2, and Appendix, *note* 1; Whart. ss. 20–56. See also The Theory of Relevancy, by G. C. Whitworth, Bombay, 1881; An English Evidence Code (art. 3), Sol. Jour. Sept. 16, 1876; and a review of Stephen's Digest, by Prof. Pollock, Fortnightly Rev. Sept. 1876.]

CHAPTER VI.

THE FACT OR TRANSACTION IN ISSUE. *RES GESTÆ.*

ACTS, declarations, and circumstances which *constitute*, or *accompany and explain*, the fact or transaction in issue, are admissible as forming parts of the *res gestæ*.

[A transaction is a group of facts so connected together as to be referred to by a single legal name—*e.g.*, a contract, tort, or crime (Steph. 4th ed. art. 3).

The term *res gestæ*, or *res gesta*, though generally applied to a fact or transaction in issue, may be used in the above connection of any material fact.]

CONSTITUENT FACTS.[a]—The fact or transaction in issue is not always admissible in evidence in the sense of being the subject of direct assertion or denial, for it may involve inferences of law or fact which it is for the Court or jury, and not for the witnesses to draw.

Where the main fact is of a simple nature, or is a necessary inference from other facts, this objection does not apply. But wherever the inference is doubtful, the proper course is for the witness to state the incidents relied on as constituting or amounting to the main fact, and not the latter *per se*.

These incidents may vary, according to the nature of the case, from a single occurrence, lasting but a few moments, to a variety of acts, declarations, and circumstances, occupying a length of time, and occurring on distinct occasions.

Sometimes the main transaction can only be established by proving a series of *similar facts*, which may happen either because the nature of the case itself demands cumu-

lative instances (*e.g.*, Barratry; Common Cheating; Custom; Trading, under the Bankruptcy Acts: see *In re* Griffen, Times, 13 Dec. 1890; Pollution, under the Rivers' Pollution Act, 1876, s. 2), or, because the similar facts have occurred in such close connection in point of time, place, or other particulars, as virtually to form one continuous transaction.

And, in criminal cases, upon the trial of one offence, evidence of others so connected cannot be excluded on the ground that they form the subject of separate indictments; although, for convenience, judges sometimes call upon the prosecution to elect as to a particular occurrence (Ros. Cr. Ev. 92, 93; 3 Russ. Cr. 370–375).

[Whart. ss. 10, 15, 26, 507–515; Tay. s. 1416; Powell, 107–110; *post*, Opinion Evidence.]

ACCOMPANYING FACTS.[b]—There are many incidents, however, which, though not strictly constituting a fact in issue, may yet be regarded as forming a part of it, in the sense that they accompany, and tend to explain, the main fact.

Not only may the probability of an occurrence be better estimated by considering its attendant circumstances, but these undesigned incidents are often essential to elucidate its true character, to reveal the motives of the parties, or to establish their connection with the fact. In testifying to the matters in issue, therefore, witnesses are required to state them, not in their barest possible form, but with a reasonable fulness of detail and circumstance.—It is not, of course, all the incidents of a transaction that may be proved; for the narrative might be run down into purely irrelevant and unnecessary detail.—Names, dates, places, and the description and circumstances of the parties, though not in issue, are always admissible. So, the physical conditions under which the main fact happened; and even similar facts, closely connected with, and explanatory of it, may often be proved; but the particulars receivable will necessarily vary with each individual case.

The main conditions of admissibility are, that the matters tendered should form the natural incidents of the act; that they should be substantially contemporaneous with it; and should qualify, explain, or complete it in some material particular (Greenleaf, s. 108; Whart. ss. 258, 259).

Declarations accompanying Acts.—Questions of evidence

in this connection usually arise with regard to statements, since with other incidents there is less danger of being misled; and there are few subjects upon which such diversity of judicial opinion exists. The following points should be noticed:—

(1) [c] The declarations are not admissible simply because they accompany a fact; the fact itself must be in issue, or relevant (Wright *v.* Tatham, 7 A. & E. 313, 361; R. *v.* Bliss, *ib.* 550; Hyde *v.* Palmer, 32 L. J. Q. B. 126); and the declaration must relate to, and can only be used to explain, the fact it accompanies, and not previous or subsequent facts (Hyde *v.* Palmer, *supra*); unless, indeed, the transaction be of a continuous nature (Rawson *v.* Haig, 2 Bing. 99; Bennison *v.* Cartwright, 5 B. & S. 1).

Moreover, it is not every declaration that accompanies and purports to explain a fact that will be received—*e.g.*, a declaration that is equivocal (R. *v.* Bliss, *supra;* and see R. *v.* Wainwright, 13 Cox 171); or is a mere expression of opinion (Wright *v.* Tatham, *supra;* Gresham Hotel *v.* Manning, Ir. R. 1 C. L. 125; Lane *v.* Bryant, 9 Gray (Mass.) 245); or is obviously concocted to serve a purpose (Thompson *v.* Trevanion, Skin. 402; R. *v.* Abrahams, 2 C. & K. 550; Brodie *v.* Brodie, 4 L. T. N. S. 307; Stark. Ev. 89; Whart. ss. 259, 265). And in America it has been held that where the act itself is free from ambiguity (Nutting *v.* Page, 4 Gray (Mass.) 584), or the declaration is inconsistent with it (State *v.* Shelley, 8 Clarke (Iowa) 477), the declaration will be rejected.

(2) [d] The declarations must be substantially contemporaneous with the fact—*i.e.*, made either during, or immediately before or after, its occurrence—but not at such an interval from it as to allow of fabrication, or to reduce them to the mere narrative of a past event (Thompson *v.* Trevanion, *supra;* Tay. s. 589; Greenleaf, s. 110; Whart. ss. 259–265).

The question of contemporaneousness has given rise to much discussion. In R. *v.* Bedingfield (see examples) it has generally been thought that Cockburn, C.J., applied the rule too strictly; on the other hand, the *dictum* of Denman, C.J., in Rouch *v.* G. W. R., 1 Q. B. 60, adopted by Mr. Taylor (s. 588), that "concurrence of time, though material, is not essential," seems to err in the opposite

direction (Lees *v.* Marton, 1 M. & R. 210; Agassiz *v.* London Tram. Co., 21 W. R. 199; R. *v.* Goddard, 15 Cox 7), substantial, though not literal, concurrence being indispensable.

(3) [e] It is sometimes said that the declaration and act must be by the same person (Howe *v.* Malkin, 27 W. R. 340, 40 L. T. 196). But though such declarations are often the only ones material, the rule is by no means so strictly confined. It is an every-day practice in criminal cases to receive the declarations of the victim, as well as those of the assailant. So, in cases of conspiracy, riot, and the like, the declarations of all concerned in the common object, although not defendants, are admissible (R. *v.* Gordon, 21 How. St. Tr. 520; R. *v.* Hunt, 3 B. & Ald. 574; R. *v.* O'Connell, Arm. & Tr. Rep. 275). It has, indeed, been held that unless some such common object be proved, the declarations of participants, if neither parties nor agents, are inadmissible (R. *v.* Petcherini, 7 Cox 79; see also Bruce *v.* Nicolupolo, 11 Ex. 129); but this limitation cannot be taken as invariable, for the exclamations of mere bystanders may sometimes be both material and admissible evidence (R. *v.* Foulkes, cited Steph. art. 3, illus. *a*; Milne *v.* Leisler, 7 H. & N. 786, per Pollock, C.B.; and see Bennison *v.* Cartwright, 5 B. & S. 1; The Schwalbe, Swab. 521; so, in America, Calena *v.* Fay, 16 Ill. 558; Whart. s. 259; May's Stephen, *note* to art. 3; Thayer, Irish L. T. 26 Feb. 1881. In Steph. art. 8, statements accompanying an act are limited to those made "by, or to, the party doing the act;" but this article should probably be read with art. 3, in which R. *v.* Foulkes, *supra*, is cited in illustration.)

(4) [f] The declarations are no proof of the fact they accompany; the existence of the latter must be established independently.

And, although admissible to explain, identify, or corroborate, it is doubtful how far they can be received as evidence of the truth of all the facts stated. (In America their admissibility for both purposes appears to be established: Thayer, *supra;* Best, s. 595, *note* to Amer. ed. by Chamberlayne.)

(5) There seems on principle to be no distinction with regard to the admissibility of the declarations between civil and criminal proceedings; and in both they may be used as evidence either for or against a party.

[Stark. Ev. 51–53, 87–89, 466–471; Greenleaf, ss. 108–110; Tay. ss. 583–589; Ros. N. P. 51–53; Powell, 156–160; Steph. arts. 3 and 8; Whart. ss. 258–267. See also two pamphlets on the Bedingfield case by Cockburn, C.J., and Mr. Pitt-Taylor; and particularly a valuable and exhaustive series of articles on "Declarations as a Part of the *Res gesta*," by Prof. Thayer, vols. xiv.–xv. Am. Law Rev., reprinted in the Irish Law Times, Jan. 15th to March 12th, 1881; also Albany Law Journal, June 19th to July 3rd, 1880. Such declarations are often considered as forming exceptions to the hearsay rule; but since they are not always admissible to prove the truth of the facts stated, and, in any case, derive their credit from the act and not from the declarant, they seem more properly receivable as original evidence: Starkie, 89; Best, s. 495, and *notes* to Chamberlayne's Amer. ed.; *contra*, Prof. Thayer, *supra*.]

Mental and Physical Conditions.[o]—Witnesses may speak directly as to their *own* feelings, motives, intentions, sentiments, or opinions at a given time, their testimony being based not on inference, but consciousness; though little reliance can be placed on evidence of this class. They may not, in general, however, testify to the state of mind of *others*, as to which they can have no direct knowledge, but must detail the facts from which the given condition may be inferred.

Among such facts, all *contemporaneous manifestations* of the given condition, whether by conduct, conversation, or correspondence, may be given in evidence as parts of the *res gestæ*, it being for the jury to consider whether they are real or feigned. Thus, the answers of patients to inquiries by medical men and others, are evidence of their state of health, provided they are confined to contemporaneous symptoms, and are not in the nature of a narrative as to how or by whom such symptoms were caused (Aveson *v.* Kinnaird, 6 East 188; R. *v.* Nicholas, 2 C. & K. 246, *per* Pollock, C.B.; R. *v.* Gloster, 16 Cox 471). And if the condition of the patient before or after the time in issue be material, his declarations at such times as to his then present condition are equally receivable (R. *v.* Johnson, 2 C. & K. 354).

It is generally said that such statements are admissible even though they form the *only evidence of the given condition;* but this has been doubted (R. *v.* Petcherini,

7 Cox 79; and see Thayer, Irish Law Times, March 12th, 1891).

A distinction must, however, be taken between declarations which are the natural *manifestation* of the given condition and those which amount to a mere *assertion* of its existence; the former being admissible, the latter not (R. *v.* Hardy, 24 How. St. Tr. 1093–1094; R. *v.* Gunnell, 16 Cox 154; R. *v.* Kay, *ib.* 292, *note;* Thayer, *supra*).

Not only may a party's own statements, but those made to him by *third persons*, be proved for the purpose of showing his state of mind at a given time (Vacher *v.* Cocks, M. & M. 353; Lewis *v.* Rogers, 1 C. M. & R. 48; Whart. s. 254).

As to the admissibility of collateral facts to prove states of mind, see *post*, p. 63.

[Tay. ss. 580–586; Whart. ss. 35, 254, 268, 269, 508; *supra.*]

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) The question being whether A. spoke certain words, alleged to be slanderous; a witness who heard the words may testify that A. used them. (Practice.)	(*a*) The question being whether A. has infringed B.'s patent; an expert, though he may give his opinion on the points of science involved, may not testify that there has, or has not, been an infringement (Seed *v.* Higgins, 8 H. L. Cas. at 566).
The question being whether a certain crime was committed by A; a witness, who was present, may speak directly and positively as to A.'s identity. (His mere opinion is also admissible: *post*, Opinion Evidence.)	The question being whether A. sold goods to B., or to B. and C. jointly; A. may not testify that "he dealt with B." the the proper inquiry being as to what was said or done at the time (Bonfield *v.* Smith, 12 M. & W. 405).—So, in a breach of promise action, the plaintiff may not testify that "the defendant promised to marry her," but should state what the defendant said or wrote (Law *v.* Capron, Q. B. D. Nov. 6, 1889, *per* Denman, J.).
To prove that A. paid a sum of money to C. by a certain day. The facts (testified to by A.) that he posted a cheque for the amount to C., and received from C. a receipt on the day in question; and the facts (testified to by C.) that he received the cheque from A. as payment and forwarded the receipt, are admissible as part of the *res gestæ* and constituting payment, though the cheque was not cashed till after the day in question, nor was it produced: and the receipt	The question being whether a railway platform was dangerous; witnesses may not testify directly, that it was or was not

Admissible.	*Inadmissible.*
though produced, would have been inadmissible *per se* as hearsay (Carmarthen Ry. *v.* M. Ry., L. R. 8 C. P. 685).	dangerous, but should state wherein the danger consisted, *e.g.*, that it was slippery, broken, &c. (Rigg *v.* Manchester, &c., Ry. Co., 14 W. R. 834). In R. *v.* Sullivan, 24 L. R. Ir. 191, Palles, C.B., doubted whether a statement by a constable that a district was "disturbed" was admissible in proof of that fact.
To prove that the defendants were common cheats; the facts that they falsely represented themselves to be persons of property on *several* occasions and to *different* persons are admissible (R. *v.* Roberts, 1 Camp. 400).	The question being whether A. was in partnership with B.; a witness may not state this fact directly, though he may state whether and in what respects A. interfered in the business (Nicholls *v.* Dowding, 1 Stark. c. 81).
To prove a custom of a manor; particular instances in which the custom was acted on are admissible, although they do not appear on any of the manorial records (Johnstone *v.* Spencer, 30 Ch. D. 581).	
To prove the delivery of goods by A. to D.; intermediate deliveries from A. to B., B. to C., and C. to D. are admissible (Ind. Ev. Act, illus. to s. 6).	
To prove the stealing of gas from the prosecutor's main on a certain date, by means of a pipe inserted in the main; the abstraction of gas intermittently for several years by the same means is admissible, as forming one continuous taking (R. *v.* Frith, 38 L. J. M. C. 54; and see as to the continuous taking of coal for several years, R. *v.* Bleasdale, 2 C. & K. 765; and as to a continuous false representation, R. *v.* Welman, 22 L. J. M. C. 118).	
(*b*) The question being whether a certain meeting was seditious; the fact that bodies of men, organised in the same manner, came from different quarters to attend the meeting, and that on their way they acted riotously and used threatening language; and the fact that seditious placards, banners, and inscriptions were used in connection with the meeting, and seditious papers sold thereat (though the defendants were not shown to be con-	(*b*) The question being whether a certain meeting was seditious; the fact that the military used violence to disperse the meeting (R. *v.* Hunt, *infra*), and the fact that seditious expressions were used by the crowd while dispersing, and within an hour of the meeting and about half a mile away from the spot (R. *v.* O'Connell, 1 Cox 403), are not admissible as parts of the transaction.

Admissible.

nected with such sale), are admissible as parts of the transaction, though not directly in issue (R. *v.* Hunt, 3 B. & Ald. 566, 577; R. *v.* Gordon, 21 How. St. Tr. 529 *et seq.*; R. *v.* O'Connell, Arm. & Tr. 257, 1 Cox 401; R. *v.* Shellard, 9 C. & P. 277).

The question being whether A. murdered B. by the explosion of grenades; the fact that other persons were killed or wounded at the same time and place is admissible to show the character of the grenades (R. *v.* Bernard, 1 F. & F. 240; and see R. *v.* McGrath, 14 Cox 598, as to an explosion by dynamite). So, on a charge of stabbing B.; evidence that about the same time and place C. was also stabbed, is admissible to identify the instrument used (R. *v.* Fursey, 6 C. & P. 81).

The question being which of two ships was to blame for a collision; the following facts, *inter alia*, are admissible as part of the transaction:—the hour of the day or night; the state of the wind, weather, and tide; the course and speed of the two vessels at the time; the lights carried by each; and the parts of the vessels which came into contact (see O. 19, r. 28).

(*c*) The question being whether a debtor absented himself from home with intent to delay his creditors; statements indicating such an intention and made either during his absence, or immediately upon his departure or return, are receivable—the absence being regarded as one continuous act (Bateman *v.* Bailey, 5 T. R. 512; Rawson *v.* Haig, 2 Bing. 99; see also examples *d*). The question being whether the user of a right of way for some years had been of right, or by licence; statements made by persons using the

Inadmissible.

(*c*) The question being whether an article patented by A. in 1849 had been publicly sold by B. before that date; a declaration by B. when selling it in 1850, that "it was a new article which he did not wish publicly known," held inadmissible to show that a sale by him in 1846 was also not public (Hyde *v.* Palmer, 52 L. J. Q. B. 120; see Agassiz *v.* London Tram. Co., examples (*d*); it would also be inadmissible as accompanying an act in itself irrelevant).

A., a priest being indicted for

Admissible.

way, held admissible to explain previous and subsequent acts of user, the whole user being of a continuous nature (Bennison *v.* Cartwright, 5 B. & S. 1). So, on questions of domicile as to statements explanatory of a continuous residence (*Re* Grove, 40 Ch. D. 216, in which case the domicil was that of a deceased person; in Brodie *v.* Brodie, 4 L. T. N. S. 307, similar declarations made *ante litem motam* by a living person were admitted).

The question being whether A. intended to sign a contract merely as agent for B., or on his own behalf as well; statements made by A. at the time of signing showing either intent, are admissible (Young *v.* Schuler, 11 Q. B. D. 651). So, his declarations at the time of paying money are admissible, to show which debt he meant to pay (Ros. N. P. 52; and see Bruce *v.* Hurley, 1 Stark. 24). So, to identify land sold by a deceased vendor, his declarations at the time of the sale are admissible (Parrott *v.* Watts, 47 L. J. C. P. 79). And declarations by a deceased person on taking possession of land are admissible as part of the act, to show in what right the land is claimed or enjoyed (Johnson *v.* Thompson, 15 L. T. 437). Mr. Taylor, s. 684, doubts whether declarations by *living* persons accompanying acts of possession are admissible under this head, though he allows such an extension might be consistent with principle. See for an example of their admission in civil cases, Hayslep *v.* Gymer, *infra*, examples (*f*). So, declarations by a living occupier of land that he held as tenant of A. are admissible to prove a breach of covenant by A. not to sub-let (Doe *v.*

Inadmissible.

burning Bibles; sermons preached by him on occasions prior to, and unconnected with, the burning, are not admissible to show that he intended merely immoral books and not Bibles to be burnt (R. *v.* Petcherini, 7 Cox 79).

The question being whether a certain road was public or private; a statement made by a deceased occupier of adjoining land, whilst planting a tree, that he did it "to show where the boundary had been when he was a boy," held inadmissible (R. *v.* Bliss, 7 A. & E. 550; *per* Williams, J., "the declaration had no connection with the act;" *per* Patteson, J., "whether the declaration accompanied the act as explanatory of it is equivocal;" *per* Denman, C.J., "a declaration to show that the party planted the tree with a particular object is inadmissible." The statement was also rejected as a declaration by a deceased person on a matter of public right: *post*, Public Rights).

In an action for obstruction of light to the windows of an hotel, the fact that guests had refused to take the rooms, and stated the darkness as the reason of their refusal, held not admissible as part of the *res gestæ*, being merely a statement of opinion (Gresham Hotel *v.* Manning, I. R. 1 C. L. 125; and see *infra*, Lane *v.* Bryant, examples *d*).

Admissible.	*Inadmissible.*
Rickarby, 5 Esp. 4). And to explain possession of stolen property, a statement made by the prisoner, before search made or suspicion attached to him, that he had found the property, would be admissible (R. *v.* Abraham, 2 C. & K. 550, *per* Alderson, B.; followed in State *v.* Daley, 53 Vt. Supreme Court 442. The editor of the last ed. of Russell on Crimes doubts the former case, remarking that such a statement is not one accompanying an act and is in the interest of the prisoner, and that he has never been able to discover any ground for this *obiter dictum*: vol. iii. p. 490; but in the text of the same vol., p. 353, it is stated that, to explain possession of stolen property, the prisoner may show that a third person left it in his care, saying he would call for it again).	
A. sues B. for trespass, the defence being a public right of way. B. proves that many years before repairs were done to the road by the township surveyor. A. may prove in explanation an agreement made by his ancestor's steward, or even by a stranger, with the surveyor, that the expense of the repairs was not to be borne by the township (Ferrand *v.* Milligan, 7 Q. B. 730).	
The question being whether A. trusted B. with goods in consequence of C.'s representation that B. was solvent;—a statement made by A. at the time of supplying the goods to B. that "he had received a favourable account of him from C." is admissible (Fellowes *v.* Williamson, M. & M. 306).	
The question being whether A. murdered B. (his wife);—the fact that a week before the murder B. went to the house	The question being whether A. murdered B.;—a statement made by B., some hours previous to the crime and while in the act

Admissible.

of a neighbour, and, handing the latter an axe and a knife, said, "Please put these up, and when I want them I will fetch them, for my husband always threatens me with them, and when they are out of the way I feel safer,"—held admissible (R. *v.* Edwards, 12 Cox 230, *per* Quain, J.).

On a charge of burglary, it appearing that the prosecutor had for some days concealed the burglary;—a statement made by him to his wife "not to tell it, as he was out late at night with the horses, and would not be safe," is admissible as explaining his conduct, although such conduct was not in issue (R. *v.* Glandfield, 2 Cox 43).

(*d*) The question being which of two vessels was to blame for a collision;—the fact that the pilot of one of the vessels, after she was cut away and while she was backing, exclaimed, stamping his foot, "The d——d helm is still a-starboard," is admissible as part of the *res gestæ*, although it would not be receivable against the owners as an admission by their agent (The Schwalbe, Swab. 521; *post*, p. 144. Admissions).

Inadmissible.

of leaving her lodgings, that "she was going to meet A." held inadmissible [R. *v.* Wainwright, 13 Cox 171. Cockburn, C.J., observed, "it was no part of the act of leaving, but only an incidental remark that might, or might not, have been carried out." A similar statement was rejected by Bovill, C.J., in R. *v.* Pook, *id.* 172, *note*. These cases conflict with the bankruptcy decisions, *ante*, p. 31. In America a considerable number of cases have been decided upon expressions almost identical with those in R. *v.* Wainwright, the preponderance of authority being perhaps in favour of their admissibility. In some of them, expressions were used by the deceased tending not merely to explain the object of the departure, but to show that the prisoner was to accompany the deceased. The latter statements were in some instances rejected as not strictly explanatory of the act, and in others received as being naturally incidental thereto. The cases are collected and discussed in the Albany Law Journal of June 19 and 26 and July 3, 1883].

(*d*) The question being whether a collision, by which the plaintiff was injured, was due to the negligence of the defendants, a tramcar company;—a remark made by a fellow-passenger of the plaintiff's to the conductor, a few moments after the collision, that "the driver ought to be reported," and the conductor's reply, that "he has already been reported, for he has been off the line five or six times to-day—he is a new driver," held inadmissible, the transaction being considered over, and the remark referring, not to the *res*, but to the

Admissible.

A. is charged with the manslaughter of B. by driving a vehicle over him. A witness saw the vehicle drive by, but did not see the accident, and immediately afterwards, hearing B. groan, went up to him, when B. made a statement as to how the matter happened. Held, the statement was admissible for this purpose (R. *v.* Foster, 6 C. & P. 325; see also Aveson *v.* Kinnaird, 6 East 193; and Thompson *v.* Trevanion, Skin. 402. These cases have been doubted by the editor of Ros. Cr. Ev., and by Cockburn, C.J., in his pamphlet on the Bedingfield case, but supported by Mr. Taylor in his reply to the latter).—A. is charged with the murder of B. A witness who lived near, hearing a shout, went to the spot, when B. made a statement as to having been robbed by A.; held admissible (R. *v.* Lunney, 6 Cox 477. This case is doubted by the editor of Russell on Crimes, and also by Cockburn, C.J., as above, but is supported by Mr. Taylor).

The question being whether a certain meeting was treasonable; —the cries of the mob at the meeting (R. *v.* Gordon, 21 How. St. Tr. 529), and seditious papers publicly sold thereat, though the defendants were not proved to have been connected with the sale (R. *v.* O'Connell, Arm. & Tr. 275), are admissible as part of the *res gestæ*.

The question being whether a bankrupt absented himself from

Inadmissible.

past acts of the driver (Agassiz *v.* London Tram. Co. 21 W. R. 199). In America a remark by one driver, immediately after a collision, that "the other was to blame," was rejected as opinion evidence (Lane *v.* Bryant, 9 Gray (Mass.) 245).

On a trial for murder;—an exclamation made by the deceased while rushing, with her throat cut, out of a house which the prisoner had been seen to enter a minute or two before (he being subsequently found, with his own throat partially cut, lying in one of the rooms) of, "Oh, aunt, see what Bedingfield has done to me!" held inadmissible, the transaction being considered over (R. *v.* Bedingfield, 14 Cox 341, *per* Cockburn, C.J., after consulting Manisty and Field, JJ. In R. *v.* Goddard, 15 Cox 7, Hawkins, J., rejected a somewhat similar statement made ten minutes after the injury).

The question being whether a meeting convened by A. was treasonable;—declarations made by A. the previous night, and subsequently to the meeting, are inadmissible (R. *v.* Gordon, 21 How. St. Tr. 542–3). So, expressions used by the crowd while dispersing, within an hour of the meeting, and half a mile away (R. *v.* O'Connell, 1 Cox 403).

The question being whether a bankrupt absented himself from

Admissible.

16th February to 9th March to defeat his creditors;—letters written by him in the middle of January, asking for further time for payments due in February, held admissible to explain his subsequent absence (Smith *v.* Cramer, 1 Bing. N. C. 585). So, the question being whether a bankrupt fraudulently transferred his property on October 25;—a conversation held by him with a creditor on November 20, in resumption of one held immediately before the transfer, held admissible to explain the latter [Ridley *v.* Gyde, 9 Bing. 345; approved by Denman, C.J., in Rouch *v.* G. W. R., 1 Q. B. 51. These cases conflict with the general current of authority on the subject, and with the opinion of Parke, B. (see opposite). Professor Thayer points out that the loose doctrine of many of the bankruptcy cases runs back to the mere *dicta* of the judges in Bateman *v.* Bailey, 5 T. R. 512, which were unnecessary for the decision: see Irish Law Times, January 29, 1881].

(*e*) The question being whether certain trees, which had fallen on land occupied by A.'s tenant, belonged to A. or to B., the adjoining owner;—the facts that A. had omitted to claim the trees, and that A.'s tenant had said, in explanation of the omission, that the trees belonged to B., are receivable (Slaney *v.* Wade, 14 East, pp. 339-342, although the tenant's admission *per se* would be no evidence against A. See also Benison & Cartwright, *supra*, p. 32).

The question being as to the legitimacy of a child born in wedlock;—statements made by the adulterer, at the time of the birth, are admissible as explaining

Inadmissible.

home on a certain morning in order to defeat his creditors;—a statement made by him the same evening is not admissible to explain such absence (Lees *v.* Marton, 1 M. & R. 210, *per* Parke, B.; and see Thomas *v.* Connell, 4 M. & W. 267, and Peacock *v.* Harris, 5 A. & E. 449).

The question being as to the terms on which A., the country agent of B., bought goods from C.; a letter written immediately after the sale by A. (deceased) to B., stating the terms and enclosing C.'s invoice and draft for acceptance by B., is not admissible as part of the *res gestæ* (Smith *v.* Blakey, L. R. 2 Q. B. 326, *per* Blackburn, J.).

(*e*) The question being whether A., in building a wall, had encroached on land owned by B. in fee;—the fact that, at the time of building the wall, B.'s father (who was tenant for life of the land) had directed A. where to build the wall, held inadmissible, on the ground that the act and the declaration were by different persons [Howe *v.* Malkin, 27 W. R. 340; 40 L. T. 196. The statement was also rejected as an admission by B.'s predecessor in title. In America similar declarations were rejected on the ground that, the act of building being unequivocal, verbal explanations were incompetent: Nutting *v.* Page, 4 Gray (Mass.) 584].

Admissible.

his conduct (Burnaby *v.* Baillie, 42 Ch. D. 282).

On a trial for murder ;—the fact that a witness who was in the room with the deceased just before the latter was shot, seeing a man with a gun in his hand pass the window, exclaimed, "There's the butcher" (a name by which the prisoner was known), is admissible (R. *v.* Foulkes, Steph. Dig. art. 3, illus. *a*).—So, in a running-down case, an exclamation by a bystander of "Shame!" if made at the time, would be receivable (Milne *v.* Leisler, 7 H. & N. 786, *per* Pollock, C.B.; see also R. *v.* Gordon and R. v. O'Connell, *supra*, p. 35).

(*f*) The question being whether B. (deceased) had given certain notes to A., her housekeeper ;—a statement made by A., when delivering the notes to B.'s executor at the latter's request, that "B. had given them to her," held, in an action by A. to recover the notes, admissible as slight evidence of the gift (Hayslep *v.* Gymer, 1 A. & E. 162. The statement was also admissible as being made in the executor's presence, and not denied by him : *post*, p. 147). See also R. *v.* Foster, 6 C. & P. 325; *supra*, examples (*d*), in which a statement by the deceased that he had been knocked down by a cabriolet was held evidence of that fact.

Inadmissible.

A., a priest, is indicted for burning certain Bibles. It having been proved that the Bibles were burnt by two boys employed by A., exclamations by another boy, not employed by A., but who was one of a crowd which assisted at the burning, held inadmissible (R. *v.* Petcherini, 7 Cox 79 ; and see R. *v.* Gordon and R. *v.* O'Connell, *supra*, p. 35).

(*f*) The question being whether A. sold goods to B. personally, or to B. as C.'s agent, the sale being made "subject to inquiry as to the position of B. and C." ;—a letter written by A. to a third person asking him to make the necessary inquiry, "as B. is making large purchases for C.," though admissible as part of the transaction—in corroboration of other evidence—is no proof that B.'s purchase was for C. (Milne *v.* Leisler, 7 H. & N. 786).

To disprove adverse possession of land by A. (deceased), a statement by A., while in possession of the land, that she held it for life, and afterwards it would go to the heirs of B., is not admissible to prove the *quantum* of her interest, though it is to explain the nature of her possession (Doe *v.* Rettett, 5 B. & Ald. 223; though see Doe *v.* Rickarby, example (*c*), pp. 32–33).

A., a letter-carrier, is indicted for secreting a letter containing a bill of exchange. The letter states that the bill is enclosed ; this statement, though it may be read to the jury, is no proof

Admissible.	*Inadmissible.*
	that the bill was enclosed (R. *v.* Plumer, R. & R. 264; see, however, R. *v.* Cooper, 1 Q. B. D. 19. It would be admissible to show the purpose for which the bill was sent: Bruce *v.* Hurley, 1 Stark. R. 24).
	The question being as to the legitimacy of a child born in wedlock;—letters from the mother to a friend stating that the adulterer was the father of the child (Aylesford case, 11 App. Cas. 1), and statements by the adulterer, about the time of the birth, acknowledging the paternity (Burnaby *v.* Baillie, *supra*, p. 37), though admissible as forming part of the conduct of each, are no evidence of the truth of the statements.
(*g*) The question being as to A.'s motive in instituting criminal proceedings against B.;—A., as a witness, may state that "his motive was solely to further the ends of justice" (Hardwick *v.* Coleman, 1 F. & F. 531). So, on a question of domicile, A. may state what his intention was in residing in a particular place (Wilson *v.* Wilson, L. R. 2 P. D. 435, 444).	(*g*) The question being whether A. is insane;—A.'s friends, servants, and neighbours may not testify that A. is, or is not, sane (see *post*, Opinion Evidence; medical men, provided they have personally examined A., may testify directly as to his sanity: *id.*).
The question being as to the sanity of a deceased testator;—his conduct in indorsing, answering, and acting upon letters received by him from third persons is admissible; and, such conduct having been proved, the contents of the letters are receivable as statements accompanying and explaining it (Wright *v.* Tatham, 7 A. & E. 324).	The question being as to the sanity of a deceased testator;—letters from third persons found in his possession with their seals broken, but without any evidence of their having been acted on by him, are inadmissible [Wright *v.* Tatham, *supra*. In other cases than sanity this would be sufficient evidence of knowledge to admit the letters: Tay. s. 573].
The question being whether A. caused B.'s death by poison;—the fact that shortly before the alleged administration of poison B. appeared to be, and expressed himself as being, in	The question being whether A. caused B.'s death by an illegal operation;—statements by B., made during her illness, that A. had operated upon her, and that her illness was caused thereby,

Admissible.	*Inadmissible.*
good health, and subsequently exhibited symptoms and made statements expressive of suffering, are admissible (R. *v.* Johnson, 2 C. & K. 354; R. *v.* Lamson, Browne & Stewart's Poison Trials).	are inadmissible (R. *v.* Gloster, 16 Cox 471). So, her statements as to what her symptoms had been some days prior to such statements [*id.*; and see Gardner, Peerage, Le March. 169–176. In Witt *v.* Witt, 3 Swab. & Trist. 143, Sir C. Creswell rejected *letters* written by a patient to a medical man describing his symptoms; *sed qu.*].
The question being as to the terms upon which A. and B. (a husband and wife) lived together; —their language and conduct, and their letters to each other, or to third persons, at the time, are admissible (Tay. ss. 169, 582; to prevent collusion, independent evidence may be required that such letters were written at the time they bear date: Houliston *v.* Smyth, 2 C. & P. 24, where letters were rejected owing to the absence of such evidence).	
To prove that the acts of certain defendants inspired terror in a locality;—complaints of alarm and requests for military assistance are admissible without calling the persons who made them (R. *v.* Vincent, 9 C. & P. 275).	
The question being whether A. knew that he was insolvent at a certain time;—his own statements implying consciousness of the fact, as well as letters from third persons refusing to advance him money, are admissible after the fact of his insolvency has been proved independently (Thomas *v.* Connell, 4 M. & W. 267; Vacher *v.* Cocks, *id.* 353; Cotton *v.* James, M. & M. 273; as to when the bankrupt's own statements are receivable as admissions, see *post*, p. 146).	The question being whether A. knew that B. had committed a certain crime;—A.'s own statement out of court, that he knew it, is inadmissible (R. *v.* Gunnell, 16 Cox 154; and see R. *v.* Kaye, *id.* p. 292, *n.*).

CHAPTER VII.

AGENCY. PARTNERSHIP. COMPANY. CONSPIRACY.

WHEN a party is, by the substantive law, rendered liable, civilly or criminally, for the acts, contracts, or representations of third persons, and such facts are material, they may generally be given in evidence for or against him as if they were his own.

The particular relationship rendering such evidence receivable must in all cases be proved *aliunde* to the satisfaction of the judge, and cannot, except as against themselves, be established by the declarations of such third persons. The following are the principal relationships of this kind :—

AGENCY.[a]—In *civil cases* the acts, contracts, and representations of the agent bind the principal when they have been expressly or impliedly authorized, or subsequently ratified, by him. And there is implied authority in the agent to conduct the principal's business in the usual way—what is necessary for this purpose being determined by the nature of the business, and the practice of those engaged in it; evidence on both these points is therefore admissible (*In re* Cunningham, 36 Ch. D. 582. As to *admissions* by agents, see *post*, p. 138). And the principal is liable for the fraud of his agent if committed in the course of the business and for the principal's benefit, but not otherwise. So, also, the knowledge of agents, brokers, and solicitors, when acting within the scope of their employment, may affect their principals. As to notice to solicitors, see Conveyancing Act, 1882, s. 3; 2 Watson, Equity, 1149–1157; *Re* Cousins, 31 Ch. D. 671; notice to a managing clerk acting in a transaction in place of the solicitor, with the client's consent, is notice to the client (*Re* Ashton, *Ex parte* McGowan, 64 L. T. 28); but a solicitor is not his client's agent for the receipt of notice in a mercantile transaction (Tate *v.* Hyslop, 15 Q. B. D. 368).

It must be remembered, however, that there are some persons (*e.g.*, infants) who cannot appoint an agent; and some acts which an agent cannot do. Moreover, an agent cannot, in general, delegate his authority.

A party is not in general *criminally* responsible for the acts or knowledge of his agents and servants, unless such acts have been directed, or assented to, by him.

In a few cases, however, the law holds him answerable for acts done under his presumed authority, even where he has no guilty mind himself.

[Tay. ss. 115, 602–605, 905–906; Best, s. 531; Powell, 163; Evans, Principal and Agent, 124–200; Beven on Negligence, 271–312; Whart. ss. 1170–1173.]

PARTNERSHIP.[b]—A similar rule holds in cases of partnership, each partner being constituted the agent of the others for all purposes within the scope of the joint business. Hence, after proof *aliunde* of association, the acts, contracts, and representations of each partner which have been expressly authorized, or are impliedly so (*i.e.*, necessary for carrying on the partnership business in the usual way), or which have been subsequently ratified, are admissible against the firm (the Partnership Act, 1890, ss. 6–8, 15). And "Notice to any partner who habitually acts in the partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by, or with the consent of, that partner" (*id.* s. 16). As to *admissions* by partners, see *post*, p. 133.

The declarations of a partner are not, however, except as against himself, admissible to prove the existence of the partnership (Tay. s. 753); or, probably, the nature and extent of the partnership business (Lindley, Partnership, 166); or the extent of his own authority to bind the firm (*Ex parte* Agace, 2 Cox Eq. 312). As to preliminary proof of these matters, see Lindley, Partnership, pp. 80–90.

[Tay. ss. 498–499; Ros. N. P. 71; Lindley on Partnership (5th ed.), 80–90, 124–268, and Supplement; Pollock on Partnership, *notes* to the sections of the Act quoted above.]

COMPANY.[c]—A company is liable for the acts, contracts, and representations of its directors, or other lawful agents, which are within the scope of their authority.

It is not, however, liable for acts done or contracts made *before* its formation by its promoters, provisional or managing committee-men, directors, or subscribers; nor can such acts and contracts be afterwards ratified, in the proper sense of the term, by the company, though the same result may be effected by other means. Neither is the company liable for acts and contracts done or made after its formation, but which are *ultra vires*.

The above-named persons are not, generally speaking, individually liable, merely on account of their common object, for the acts of their colleagues, whether done before or after the company's incorporation.

[Lindley on Company Law, 143–153; Brice on *Ultra Vires*. As to *admissions* by the officers of a company, see *post*, p. 138; and as to Company Books, pp. 150, 245.]

CONSPIRACY.[d]—On charges of conspiracy, after *primâ facie* evidence of combination has been given, the acts and declarations of each conspirator in furtherance of the common object, are admissible against the rest.

And this is so, although the acts and declarations proceeded from conspirators not included in the indictment (Ros. Cr. Ev. 407–408); or were done in the absence of the party against whom they are offered; or without his knowledge; or even before he joined the combination. (R. *v.* Brandreth, 32 How. St. Tr. 857; R. *v.* Murphy, 8 C. & P. 311). And after overt acts within the jurisdiction have been proved, others done beyond it are receivable (R. *v.* Gordon, 21 How. St. Tr. 535).

But the acts and declarations of others not in furtherance of the common purpose (*e.g.*, mere admissions as to past events), or done or made after his connection with the conspiracy has ceased, are not admissible against a conspirator.

Acts of accomplices after the arrest of a conspirator will, however, be received if done in pursuance of prior instructions from him (R. *v.* McCafferty, I. R. 1 C. L. 363); so, with writings found after his arrest, but which have existed previously (R. *v.* Watson, 32 How. St. Tr. 337–350). And the acts of a prisoner after his arrest may be admissible against those who have joined in a conspiracy to release him (R. *v.* Desmond, 11 Cox 146).

The acts and declarations of *co-trespassers* in civil actions are governed by the same rules.

[Tay. ss. 590–597; 3 Russ. Cr. 143–151; Best, s. 508; Ros. Cr. Ev. (11th ed.) 399–408; Steph. art. 4.]

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) A., a horse-dealer, instructs B., his servant, to sell a horse without a warranty; B. sells the horse with a warranty. The sale and warranty bind A., as being within the usual course of a horse-dealer's business (Howard *v.* Sheward, L. R. 2 C. P. 148, 36 L. J. C. P. 42).	(*a*) A., a private owner, instructs B., his servant, to sell a horse without a warranty to a private purchaser; B. sells the horse with a warranty. The sale, but not the warranty, binds A., as B. had no express or implied authority to give the latter (Brady *v.* Todd, 15 C. B. N. S. 834, 31 L. J. C. P. 224; *aliter*, perhaps, if the horse were sold at a public fair or mart).
A., as solicitor for B., obtains judgment against C., and, without instructions from B., issues execution against C.'s goods.—A. is bound by B.'s act, as being within the ordinary course of a solicitor's business (Smith *v.* Keal, 9 Q.B.D. 340).	A., as solicitor for B., a judgment creditor of C., issues execution against C.'s goods without authority from A., and also gives the sheriff special directions as to seizing particular goods belonging to C.—B. is not bound by such directions (Smith *v.* Keal, *supra*).
A., a shipowner, instructs B., a broker in Scotland, to re-insure an overdue ship. B., who has received confidential information of the ship's loss, puts the matter in the hands of C., his London agent, who insures with D., a London broker. None of the parties except B. know of the ship's loss, and B. receives no commission.—A. cannot recover on the policy, by reason of B.'s knowledge and concealment of a material fact (Blackburn *v.* Haslam, 21 Q. B. D. 144).	A., a shipowner, instructs B., a broker in Scotland, to re-insure an overdue ship. B., who knows, but conceals the fact, of its loss, re-insures the ship with C., a London broker. Afterwards A., by an independent negotiation, not conducted through B., re-insures the ship for a further amount.—A. can recover on the second policy, as he is not affected, with regard to it, by B.'s knowledge and concealment of the ship's loss (Blackburn *v.* Vigors, 12 App. Cas. 531; so, also, as to knowledge and concealment by A.'s solicitors: Tate *v.* Hyslop, 15 Q. B. D. 368).
The question being whether A., the owner of a dog, knew of its mischievous propensities.—Complaints about the dog made to	The question being whether A., the owner of a dog, knew of its mischievous propensities.—Complaints about the dog made to

Admissible.

A.'s wife, who had charge of his business in his absence, or to A.'s servant, who had charge of the dog, are admissible to affect him with knowledge [Gladman *v.* Johnson, 36 L. J. C. P. 153; Baldwin *v.* Casella, L. R. 7 Ex. 325; so also, it seems, complaints made to A.'s barman, who occasionally had charge of his business: Applebee *v.* Percy, L. R. 9 C. P. 647].

The directors of a gas company are criminally charged with causing a nuisance. The nuisance arose through the negligence of their superintendent and engineer, who had, unknown to the directors, exceeded their instructions. The directors are liable (R. *v.* Medley, 6 C. & P. 292).—A., a publican, is charged with suffering gambling upon his premises. The gambling had, unknown to A., been permitted by his potman, who had charge of the business at the time. A. is liable (Bond *v.* Evans, 21 Q. B. D. 249). So, as to a baker whose foreman had made unwholesome bread (R. *v.* Dixon, 4 Camp. 12).

Inadmissible.

A.'s stableman and also to A.'s domestic servant, neither of whom had charge of A.'s business or of the dog, are not admissible to affect A. with knowledge [Stiles *v.* C. S. N. Co., 33 L. J. Q. B. 310; Coggett *v.* Norris, 2 Times L. R. 417, 471; Cleverton *v.* Uffernel, 3 Times L. R. 509.—And see as to notice of a defect in a builder's plant, given to his foreman, the latter not being the manager of the whole work or of the particular part in question, Gallaher *v.* Piper, 33 L. J. C. P. 329].

A. is charged with negligently using a furnace so as to emit smoke. Neither A. nor his foreman had been negligent, but the smoke was caused by A.'s stoker, who had improperly lighted the furnace. A. is not liable criminally, though he might have been civilly (Chisholm *v.* Doulton, 22 Q. B. D. 736).—A., a publican, is charged with suffering gambling upon his premises. The gambling had, unknown to A., been permitted by his potman, who was not in charge of the business at the time. A. is not liable (Somerset *v.* Hart, 53 L. J. M. C. 77).

A. is indicted for falsely pretending to have lost luggage on a railway. It was proved that A.'s solicitor had written the letter making the claim "in consequence of an interview he had with A." The letter is not admissible against A. *Aliter* if the letter had been written "in pursuance of instructions received from A."; or if the proceedings had been civil (R. *v.* Downer, 14 Cox 486). So, the fact that the prosecutor's agent had offered a bribe to a witness is not evidence for the prisoner (Queen's case, 2 B. & B. at 306–309).

Admissible.	*Inadmissible.*
(*b*) A. and B. enter into a trading partnership. A., in order to pay a private debt of his own, accepts a bill in the name of the firm. B. is liable, as the acceptance of bills is an act within the usual course of business of a trading partnership (Lindley, Partnership, 169).	(*b*) A. and B. enter into partnership as solicitors. A., in order to pay a partnership debt, accepts a bill in the name of the firm. B. is not liable, as such an act is not within the usual course of a solicitor's business (Hedley v. Bainbridge, 3 Q. B. 316).
(*c*) The directors of a company, having power to borrow money with the consent of an extraordinary general meeting of the shareholders, borrow money on debentures without calling a general meeting. The company is bound, for the act, though irregular, is *intra vires* (Agar *v.* The Athenæum Life Assurance Society, 3 C. B. N. S. 725).	(*c*) The objects of a company being "to contract to supply materials for making railways," a contract by the directors to *construct* a railway is *ultra vires*, and does not bind the company (Ashbury Railway Carriage Co. v. Riche, L. R. 7 H. L. 653).
A., the station-master of a railway company, orders medical attendance for a porter injured in the company's service. The company is liable, as the act is within A.'s implied authority (Walker *v.* G. W. R., L. R. 2 Ex. 228).	A., the manager in S. America of a London company dealing in tinned provisions, enters into a contract with B. to supply tongues for tinning. B. having refused to supply the tongues unless guaranteed by C., C. gives his guarantee upon receiving from A., as indemnity, a promissory note signed by A. on behalf of the company.—The company is not liable on the note, the matter not being one ordinarily necessary for the carrying on of the business (*Re* Cunningham, 36 Ch. D. 532).
A., as agent of an insurance company, induces B. to insure his life by falsely promising to get him a loan on the security of his policy. The company knows of the promise and receives the premium. The company is liable to return the money so obtained (Blake *v.* Albion Life Assurance Society, 4 C. P. D. 94.)	A., the secretary of a company, makes an untrue representation to B., thereby inducing him to take shares in the company. The company is not liable to B. (Barnett *v.* S. L. T. Co., 18 Q. B. D. 815; Newlands *v.* N. E. A. Association, 54 L. J. Q. B. 428). The company having afterwards authorized B. to answer inquiries respecting their property—B., by false representations as to the property, obtains money from a third person for his own benefit. The company is not liable, the representation not being made on its

Admissible.	*Inadmissible.*
	behalf or for its benefit (British M. Co. *v.* Charnwood, 18 Q. B. D. 714; *aliter* if so made).
(*d*) A. and B. are indicted in Middlesex for a conspiracy to destroy property. After proof of acts done in Middlesex by both the conspirators, acts done by either of them in Surrey in execution of the conspiracy are admissible against each (see R. *v.* Gordon, 21 How. St. Tr. 535; R. *v.* Bowes, 4 East 171).	(*d*) A. and B. are indicted in England for a conspiracy to commit a felony. The only evidence of the conspiracy consists of acts done by A. in Scotland, and letters written by A. to B. in England inciting B. to commit the crime, but which letters B. did not answer or assent to. The acts and letters are not admissible against either A. or B. (R. *v.* Boulton, 12 Cox 87).
A. and B. conspire to assault C. with their fists. In the struggle C. is killed by a blow from B. A. and B. are each criminally responsible for C.'s death (R. *v.* Caton, 12 Cox 624).	A. and B. conspire to assault C. with their fists. In the struggle B. catches up a deadly weapon and kills C.—A. is not responsible for B.'s act, as it was not done in furtherance of the common design (R. *v.* Caton, *supra*).
A. and B., employees at the Custom House, are charged with conspiring to pass goods through the Custom House without paying full duty.—False entries made in the books for the purpose of carrying out the fraud by A. are admissible against B. (R. *v.* Blake, 6 Q. B. 126).	A. and B., employees at the Custom House, are charged with conspiring to pass goods through the Custom House without paying full duty.—An entry made by A. on the counterfoil of his own cheque-book showing how he had shared the proceeds of the transaction with B. is not admissible against the latter, not being in furtherance of the common fraud (R. *v.* Blake, *supra*).
A. and B. are indicted for conspiracy. A letter written by A. to B., but never received by B., in which A. described the proceedings which had already been taken as an encouragement to B. to proceed in the concern, is admissible against B. as an act done in furtherance of the common plot (R. *v.* Hardy, 24 How. St. Tr. 473-477).	A. and B. are indicted for conspiracy. A letter written by A. to C. (not a member of the conspiracy) describing the proceedings already taken, and enclosing songs composed by A. and sung at them, is not admissible against B., not being a transaction in support of the conspiracy (R. *v.* Hardy, 24 How. St. Tr. 451-453).—A conversation held by D. and E., two other members of the conspiracy, on their return from a meeting of the conspirators, and about an hour after the meeting, is also inadmissible against A. and B. (R. *v.* O'Connell, 1 Cox 403).

CHAPTER VIII.

FACTS RELEVANT TO PROVE THE MAIN FACT.

CONSISTENT AND INCONSISTENT FACTS.[a]— Previous, subsequent, and collateral facts, which are only or chiefly consistent with the existence of the main fact, may be given in evidence in proof thereof; and in disproof, those which are inconsistent, or show it to have been impossible.

GENERAL COURSE OF BUSINESS.[b]—To prove that an act has been done, it is admissible to prove any general course of business or office, whether public or private, according to which it would ordinarily have been done.

[Tay. ss. 176–183; Best, s. 403; Ros. N. P. 43; Steph. art. 13.]

CUSTOM TO ANNEX INCIDENTS TO CONTRACTS.[c] —Proof of usage is admissible to annex unexpressed incidents (not inconsistent with those which are expressed) to oral or written contracts; it being presumed that a party dealing in a particular market or place intends to contract according to its established usages. If such usages be sufficiently general and notorious, they will even bind parties contracting in ignorance of them.

The party against whom the evidence is tendered may, on his side, show that the usage does not exist, or was expressly excluded, or is unreasonable, or illegal.

Custom or usage may be proved either by the direct evidence of witnesses (which must be positive, and not amount to mere opinion: Lewis *v.* Marshall, 7 M. & G. 744), in which case particular instances of its occurrence or non-occurrence will be admissible in corroboration or rebuttal (Rushforth *v.* Hadfield, 7 East 228; Lewis *v.* Marshall, *supra;* Bourne *v.* Gatcliffe, 11 C. & F. 45; Delamotte *v.* Lane, 9 C. & P. 261); or by a series of particular instances

in which it has been acted upon (Johnstone *v.* Spencer, 30 Ch. D. 581; *ante*, chap. vi. example (*a*); Steph. art. 6).

When, however, a custom has been frequently proved in the superior courts (which may be shown by reported cases), it will be judicially noticed without evidence (*ante*, Judicial Notice, p. 7).

As to the admissibility of usage to explain the terms of a document, see *post*.

[Tay. ss. 1168–1170, 1187–1189; Ros. N. P. 22–27; Powell, 460–465; Whart. ss. 962–971.]

PREVIOUS EXISTENCE OF FACTS.[d]—States of persons, mind, or things, at a given time, may in some cases be proved by showing their previous existence in the same state; there being a probability that certain conditions and relationships continue—*e.g.*, human life, marriage, sanity, opinions, title, partnership, official character, domicile.

This probability will weaken with remoteness of time, and only continues till the contrary is shown, or a different presumption arises from the nature of the case.

[Tay. ss. 196–205; Best, ss. 405–410; Whart. ss. 1284–1296.]

STANDARDS OF COMPARISON.[e] **Conduct.**—On questions involving negligence and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, or even the general practice of the community on the subject, are admissible as affording a standard by which the conduct in question may be gauged (Ball, Leading Cases on Tort, 224–227; East, P. C. 263–264; Whart. Negligence, s. 46; *post*, States of Mind, 65; and see also Opinions of Experts).

Handwriting.—So, when a party's handwriting is in question, whether in civil or criminal proceedings, "Comparison of the disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court or jury as evidence of the genuineness, or otherwise, of the writing in dispute" (28 & 29 Vict. c. 18, s. 8). The disputed writing must be produced in court (Arbon *v.* Fussell, 3 F. & F. 152).

The comparison may include the general character of the

writing; the forms, or relative number of diversified forms, of the letters; the use of capitals, abbreviations, stops, and paragraphs; the mode of effecting erasures, interlineations, and corrections; the orthography of words, grammatical construction of sentences, and style of composition; the use of peculiar expressions, and the fact of one or more of the documents being written in a feigned hand (Tay. s. 1872).

The documents used for comparison need not be relevant or admissible for *any other purpose* (Brookes *v.* Tichborne, 5 Ex. 929; Birch *v.* Ridgway, 1 F. & F. 270; Cresswell *v.* Jackson, 2 F. & F. 24); or have been written *ante litem motam*. And the comparison may be made either by witnesses acquainted with the writing, or by experts, or, without the help of either, by the jury, or, if there be none, by the judge (Tay. s. 1870; but see R. *v.* Harvey, 11 Cox 546).

The party whose writing is in dispute may also be required to write, for the purpose of comparison, in the judge's presence, and such writing will then itself be admissible (Cobbett *v.* Kilminster, 4 F. & F. 490).

It is doubtful whether *fictitious specimens* may, on cross-examination, be submitted to a witness in order to impeach his testimony.

The genuineness of *ancient documents* (*i.e.*, more than thirty years old) may be proved by comparison with other ancient writings shown to have come from *proper custody* and to have been uniformly *treated as genuine*.

[Tay. ss. 1869–1879; Best, ss. 238–248; Ros. N. P. 138–140; Steph. art. 52; *post*, Opinion Evidence.]

ACTING IN A CAPACITY.—In some cases, acting in a capacity or relationship may afford *primâ facie* evidence of title to it, even in favour of the party so acting, the presumptions as to the regularity of acts, and against misconduct and bad faith, applying.

Thus, acting in a *public office* is evidence of due appointment thereto, although the appointment itself is required to be by deed (Dexter *v.* Hayes, 11 Ir. L. R. N. S. 106); is directly in issue in the case (*ibid.*); and the proceedings are criminal (R. *v.* Gordon, 1 Lea. 515). So trading as a *public company* is evidence of incorporation (R. *v.* Langton, 13 Cox 349); and user is evidence of a licence to use a *public building* (*e.g.*, a church: R. *v.* Cresswell, 1 Q. B. D.

446; or a theatre: Rodwell *v.* Redge, 1 C. & P. 220; though where notice of a licence is required to be exhibited, the absence of such notice will be evidence of the absence of a licence: Gregory *v.* Tuffs, 6 C. & P. 271). On similar grounds, cohabitation is evidence of a valid *marriage*, its weight varying with the circumstances (Tay. s. 172, and cases); and in settlement cases the relationship of *master and servant* may be proved by acting therein (R. *v.* Fordingbridge, 27 L. J. M. C. 290); though this is not sufficient in a criminal case (R. *v.* Taylor, 10 Cox 544); and generally private relationships and appointments cannot, unless by admission, be so proved—*e.g.*, that of *solicitor and client* (Bright *v.* Legerton, 2 D. F. & J. 606); *principal and agent* (Courteen *v.* Touse, 1 Camp. 43, *n.*; Short v. Lee, 2 Jac. & W. 467; Tay. s. 683; see *post*, Similar Facts); or even, it seems, the office of *vicar* (Miller *v.* Wheatley, 28 L. R. Ir. 144; see Tay. ss. 173–175).

Similarly, *title to property* may frequently be inferred from *acts of ownership*—*e.g.*, possession, receipt of rents and profits, and the discharge of the burdens or repairs of the property; while, in rebuttal, proof is admissible that these acts were disputed, or done in the absence of persons interested in disputing them (Tay. ss. 123–142; Best, ss. 366–399; Ros. N. P. 40, 859–866; Steph. art. 5; *post*, p. 187).

[Tay. ss. 171–175; Best, 353–365; Ros. N. P. 43, 44, 53, 54; Powell, 83–92; Whart. ss. 1297 1319.]

Ancient Possession.(*f*)—Ancient documents by which any right of property purports to have been exercised (*e.g.*, leases, licences, and grants) are admissible, even in favour of the grantor or his successors, in proof of ancient possession.

The grounds of admission are twofold, — *necessity*, ancient possession being incapable of direct proof by witnesses; and the fact that such documents are themselves *acts of ownership*, real transactions between man and man, only intelligible upon the footing of title, or at least of a *bonâ fide* belief in title, since in the ordinary course of things men do not execute such documents without acting upon them (Malcolmson *v.* O'Dea, 10 H. L. C. 593; Bristow *v.* Cormican, 3 App. Cas. 641).

(1) The documents should purport to *constitute* the transactions which they effect; mere *prior directions* to do the acts, or *subsequent narratives* of them, being inadmissible

(*ibid.*). Thus, though expired leases (or even counterparts: Tay. s. 427) may be tendered to show ancient possession of the property demised, or reserved from the demise, recitals in such leases of other documents or facts will be rejected except as admissions (Bristow *v.* Cormican, *supra*).

(2) Deeds of this nature must, to ensure genuiness, be, like other ancient documents, produced from *proper custody* (see *post*); and should, to be of any weight, be *corroborated* by proof within living memory of payments made, or enjoyment had, in pursuance of them. The absence of evidence of modern enjoyment, however, goes merely to weight and not to admissibility.

(3) Ancient documents, admissible as *acts of ownership*, may be tendered on questions either of public or private right; and must be distinguished from those ancient documents which are received as evidence of *reputation*, which latter may consist of bare assertions, or recitals, of the right, but are confined to questions of public and general interest (Malcolmson *v.* O'Dea, *supra;* and see *post*, Declarations as to Public and General Rights, pp. 185–187.)

Modern Possession, being susceptible of proof by witnesses, cannot be established by modern leases, &c., even though supported by evidence of payments made thereunder (Bristow *v.* Cormican, *supra, per* Lord Blackburn; Clarkson *v.* Woodhouse, 3 Doug. 189).

[Tay. ss. 658–667; Ros. N. P. 53–54; Powell, 179–185; Whart. ss. 194–199.]

FACTS SHOWING GOOD FAITH.[o]**—COMPLAINTS.**—Facts showing the **bona fides** of a party's claim or defence (though such *bona fides* be not directly in issue) are sometimes admissible in support of his own case.

So, **Complaints** made by the injured party, *recenti facto*, although not part of the main transaction, are sometimes considered relevant to prove ill-usage even in favour of the party complaining. There is great difference of opinion, however, as to the limits within which such evidence should be confined. It is sometimes considered admissible only in cases of rape and similar offences, and for the purpose merely of confirming the testimony of the prosecutrix (R. *v.* Gutteridge, 9 C. & P. 471, *per* Parke, B.; 3 Russ. Cr. 353; Haynes *v.* Comm., 28 Gratt. 942; Prof. Thayer, Ir. Law

Times, Jan. 15, 1881; *post*, Facts affecting Witnesses); sometimes as constituting independent proof of such offences, whether the prosecutrix be called or not (R. *v.* Megson, 9 C. & P. 420; R. *v.* Nicholas, 2 C. & K. 246; in neither of which cases, however, was the evidence objected to); sometimes as independent proof of any crime of violence [*per* Patteson, J., in R. *v.* Wink, 6 C. & P. 397 (a case of robbery), and in R. *v.* Ridsdale, Stark. Ev. 469, *note* (a case of shooting); Ros. Cr. Ev. 25–27; Taylor, letter on the Bedingfield case, p. 16; in the Ecclesiastical Courts the wife's complaint was received as direct evidence of the husband's ill-usage, if made *recenti facto*, as otherwise, the parties being incompetent as witnesses, secret cruelty could not have been proved,—if not so made, it was received merely as confirmatory of the other evidence: Lockwood *v.* Lockwood, 2 Curt. 281 (1831)]; and by Mr. Justice Stephen as relevant in all criminal cases without distinction (art. 8). Complaints may, of course, be admissible as evidence of mental or bodily feeling at the time (*ante*, p. 28; see R. *v.* Vincent, 9 C. & P. 91; R. *v.* Conde, 10 Cox 547).

A similar diversity of opinion prevails with regard to the admission of the *particulars* of the complaint. When the latter has been made contemporaneously with the outrage, the particulars may be received as part of the *res gestæ*; they may also always be elicited in cross-examination. But otherwise they are either excluded altogether, or admitted with the exception of the prisoner's name; or (the most recent and sensible practice) received without reservation (R. *v.* Wood, 14 Cox 46, *per* Bramwell, B.; Steph. *note* v.; Prof. Thayer, Ir. Law Times, Jan. 29, 1881).

ADMISSIONS BY CONDUCT.[h]—A party's admissions by conduct as to the existence or non-existence of any material fact may always be proved *against* him (Tay. s. 804, and *post*, p. 14); and evidence on his part to explain or rebut such admissions is also receivable (Melhuish *v.* Collier, 15 Q. B. 878; see *post*, p. 121, as to verbal admissions).

TREATMENT.[i]—Ordinarily, acts of treatment, either by parties or strangers, expressive merely of their opinion or belief as to the existence or non-existence of facts, are not receivable except against a party as an admission by conduct (Wright *v.* Tatham, 7 A. & E. 313; Backhouse *v.* Jones, 6 Bing. N. C. 65; *post*, Opinion Evidence).

Such evidence is, however, sometimes admissible. Thus, the treatment of friends and neighbours may be received as presumptive proof of *marriage* (*post*, Reputation). So, on questions of *pedigree*, family conduct is admissible to prove relationship (*post*, Pedigree). And on questions of *legitimacy* even conduct by strangers has been received (*e.g.*, recognition by the Sovereign, to prove the legitimacy of a peer: Hubb. 698; conveyance of property by strangers to a person only entitled to it if legitimate: Slaney *v.* Wade, 7 Sim. 595; conduct of the adulterer showing that he and not the husband was the father of the child: Burnaby *v.* Baillie, 42 Ch. D. 282; *post*, Pedigree). So, too, to prove the genuineness of *ancient documents*, the fact that they have always been preserved and treated as genuine by the parties interested is admissible (*post*, Proper Custody). And, where the opinions of witnesses are admissible, instances in which they have *acted upon their opinions* are admissible in confirmation of their testimony (*post*, Opinion Evidence).

EXAMPLES.

Admissible.

(*a*) The question being whether A. survived B. in a shipwreck;—it is relevant to show that, previously to the disaster, A. was stronger, in better health, and a more expert swimmer than B. (Underwood *v.* Wing, 4 D. M. & G. 633; Tay. s. 203; Best, s. 419; Whart. ss. 28, 1280–1282. The weight of such evidence will depend upon the existence of opportunities for the display of these qualities).

The question being whether A. is the child of B.;—evidence of the resemblance, or want of resemblance, of A. to B. is admissible (Bagot *v.* Bagot, 1 L. R. Ir. 308; Burnaby *v.* Baillie, 42 Ch. D. 282).

The question being whether A. lent money to B.;—evidence of the poverty of A. about the time of the alleged loan is admissible, as tending to disprove it (*Dowling v.* Dowling, 10 Ir. C. L. 241).

Inadmissible.

(*a*) The question being whether the pupils at a certain school were badly fed and lodged;—the fact that they were badly educated is irrelevant (Boldron *v.* Widdows, 1 C. & P. 65).

The question being whether a certain meeting was seditious;—the fact that the military used violence in dispersing the meeting is irrelevant, as the intention and objects of the meeting must have existed previously to its dispersion (R. *v.* Hunt, 3 B. & Ald. 566).

A. and B. being charged in one count of an indictment with conspiring to incite the *public* to commit a certain crime, and in another count with conspiring to incite *each other* to commit the same crime;—acts of incitement done by A. and B., *inter se*, are inadmissible on the former count, and acts done by them in public are inadmissible on the

Admissible.	*Inadmissible.*
To prove that A. paid B. a debt;—the facts that (1) A. was afterwards in possession of the document creating the debt (Brembridge *v.* Osborne, 1 Stark. 374); and that (2) he paid B. a later debt,—are admissible [Tay. s. 178; Best, s. 406; Ros. N. P. 38-39; Powell, 105; Whart. ss. 1362-1365].	latter (R. *v.* Boulton, 12 Cox 87).
To prove that a certain deed was forged;—it is admissible to prove that the titles recited in the deed as those of the then reigning Sovereign were not in fact then used by that Sovereign (Lady Ivy's case, Steph. art. 9, illus. (*d*)).	The question being whether a lessee surrendered a lease *in writing* to a lessor;—the mere possession of the lease by the latter with its seals cut off is no evidence of such surrender (Doe *v.* Thomas, 9 B. & C. 288; though see as to surrender by operation of law: Tay. s. 138).
To disprove a rape, evidence is admissible that the prisoner had for many years been afflicted with a rupture which rendered sexual intercourse impossible (Hale, P. C. 635).	The question being whether an article patented by A. in 1849 had been publicly sold by B., before that date;—public sales of the article by B., after 1849, and private sales before it are irrelevant (Hyde *v.* Palmer, 32 L. J. Q. B. 126).
	The question being whether A. had passed off his own goods as those of B.;—the fact that B. had committed a fraud by advertising such goods as being patented, when in fact they were not so, is irrelevant (Lever *v.* Godwin, W. N. (C. A.) 1887, p. 107).
(*b*) To prove the *delivery* of a letter on a given date;—it is relevant to show that the letter was properly addressed, posted in due time, and not afterwards returned (British, &c., Co. *v.* Colson, L. R. 6 Ex. 122; Tay. s. 179; Powell, 92-94. The *post-marks* are also evidence of the dates and places mentioned).	(*b*) To prove the delivery of a letter posted to B. at Bristol;—the fact that it was addressed to him at "Bristol" is insufficient (Walter *v.* Haynes, Ry. & M. 149); *aliter* if this was the only address given by B. (Burmester *v.* Barron, 17 Q. B. 828).
To prove the *posting* of a letter;—it is relevant to show that it was delivered to a clerk who, though he had no recollection of the particular letter, habitually took all letters delivered to him to the post (Hetherington *v.* Kemp, 4 Comp. 193; Trotter *v.* McLean, 13 Ch. D. 574); or, that the letter was put in a given place, where all letters were regularly put for posting, whence they were always carried to the post by a servant (Hetherington *v.*	To prove the posting of a letter written by A. to B.;—evidence by one of A.'s clerks that he habitually copied all letters written by A., then returned them to A. to seal, and that afterwards, when A. gave them back, the witness or another clerk posted them;—held, in the absence of evidence to show that A. had returned that particular letter to the clerk, this was no proof of posting (Toosey *v.* Williams, M. & M. 129). So, where

Admissible.

Kemp, *supra;* Skilbeck *v.* Garbett, 7 Q. B. 846. In the former case it was held that the servant must be called, but in the latter this was not deemed essential).

To prove that a certain indorsement had been made on a (lost) licence entered at the Custom House;—it is relevant to show that the course of office was, not to permit the entry without such indorsements (Butler *v.* Allnutt, 1 Stark. 222; Van Omeron *v.* Dowick, 2 Camp. 44; Waddington *v.* Roberts, L. R. 3 Q. B. 579; see Mason *v.* Wood, 1 C. P. D. 63).

The question being whether A. paid B. his wages;—A. may show that his practice was to pay all his workmen regularly every Saturday night, that B. was seen with the rest waiting to be paid and had not afterwards been heard to complain (Lucas *v.* Novosilieski, 1 Esp. 296; and see Sellen *v.* Norman, 4 C. & P. 80; Evans *v.* Birch, 3 Camp. 10).

(*c*) The question being whether A., a broker, is personally liable on a contract made by him for an undisclosed principal;—evidence may be given of a usage that brokers who do not disclose the names of their principals are personally liable (Pike *v.* Ongley, 18 Q. B. D. 708).

A., a manufacturer, contracts to supply certain iron plates to B.;—evidence is admissible of a usage that the plates are to be of A.'s own make (Johnson *v.* Raylton, 7 Q. B. D. 438).

Inadmissible.

A.'s clerk proved that the letter had with several others been given by him to a deceased clerk to post, and that the latter had left for the post with them;—held, that mere possession for posting was insufficient (Rowlands *v.* De Vecchi, 1 C. & E. 10; it did not appear that it was the practice for the deceased to post all letters given to him. See *post*, Declaration in Course of Duty, *post*, p. 180).

(*c*) The question being whether A., a broker, is solely liable on a contract made by him, as such, for an undisclosed principal;—evidence of a custom that where brokers do not disclose the name of their principals, the broker is solely liable and the principal is discharged, is inadmissible as contradicting the contract (*semble*, Pike v. Ongley, *supra;* and see for a case in which evidence of a usage was rejected as inconsistent with an arbitration clause in a contract, Barrow *v.* Dyster, 13 Q. B. D. 635).

A. leases a farm to B., one of the terms being that the outgoing tenant's interest shall be valued according to the custom of the country;—evidence of a usage on the particular estate of which the farm forms part,

Admissible.	*Inadmissible.*
	cutting down the compensation allowed by the general custom, is inadmissible unless B. was aware of such restricted usage (Womersley *v.* Dally, 26 L. J. Ex. 219).
A., a veterinary, sues B. on a verbal contract for medicine and attendance;—evidence of a usage among veterinaries to charge for attendance as well as medicine is admissible (Sewell *v.* Corp, 1 C. & P. 392. A usage to so charge where "not much medicine is required," was rejected as too uncertain).	The question being whether a horse which had been certified sound by a veterinary, had also been warranted sound by the vendor, a horse-dealer;—evidence of a practice, not amounting to a recognised custom of the trade, for horse-dealers not to warrant horses so certified, is inadmissible (Howard *v.* Sheward, L. R. 2 C. P. 148).
(*d*) The question being whether A. believed in a Supreme Being when taking the oath on his election to Parliament;—evidence may be given that A. had no such belief four years before his election (A.-G. *v.* Bradlaugh, 1 C. & E. at 467–469. Such evidence is admissible *for* as well as *against* a party; see, *e.g.*, Hardy's case, 24 How. St. Tr. 1093–1094; R. *v.* Tooke, 1 East P. C. at 61). So, to prove the existence of a partnership in 1838, evidence is admissible that it existed in 1816 (Clark *v.* Alexander, 8 Scott N. R. 161).	
(*e*) The question being whether the pupils at a certain school were properly treated;—evidence is admissible of the *general* treatment of boys at schools of the same class, as affording a criterion of what the treatment should have been at the school in question (Boldron v. Widdows, 1 C. & P. 65).	(*e*) The question being whether the pupils at a certain school were properly treated;—evidence is not admissible of the comparative treatment of boys at any other *particular* school (Boldron *v.* Widdows, *supra*).
The question being whether A. cruelly ill-treated an animal by performing a certain operation upon it;—evidence is admissible that such an operation was customary in that part of the country, and that there was	

Admissible.

a general belief that it produced beneficial results to the animal (Lewis *v.* Fermor, 18 Q. B. D. 532; and see Murphy *v.* Manning, 2 Ex. D. 307; and Ford *v.* Wiley, 23 Q. B. D. 203. Such evidence, though admissible, will not necessarily afford a legal excuse for the act).

The question being whether a railway company was negligent in not employing more than one man to manage a coal engine;—the fact that for twenty years it had been usual only to employ one man, and that no accident had happened, is admissible as tending to rebut negligence (Hart *v.* Lancs. & York. Ry. Co., 21 L. T. N. S. 261; see Hammock *v.* White, 11 C. B. N. S. 588).

(*f*) The question being whether a corporation is entitled to claim tolls;—an ancient table of such tolls kept by the town clerk of the corporation, by which the the lessees of the tolls had always been guided in their collections, is admissible in favour of the corporation (Brett *v.* Beales, M. & M. 419). So, to prove that a corporation was entitled to a fishery;—ancient entries in the corporation books, purporting to constitute licences to fish, and not mere directions to prepare such licences, or narratives of them, are receivable in favour of the corporation (Malcolmson *v.* O'Dea, 10 H. L. C. 593). So, counterparts of leases, though only executed by the lessee (Doe *v.* Pulman, 3 Q. B. 622; Magdalen Hospital *v.* Knotts, 8 Ch. D. 709).—And an original collation to a living by the bishop, is evidence of title to the advowson in favour of his successors (Irish Society *v.* Derry, 12 C. & F. 64).

(*g*) The question being whether

Inadmissible.

(*f*) The question being whether a corporation is entitled to claim tolls;—ancient entries in the books of the corporation, ordering powers of attorney to be made out to its bailiffs authorizing them to receive the tolls, are not admissible (Brett *v.* Beales, *supra*); so, entries that tithes should be taken in kind, in default of money-payments in lieu thereof, are inadmissible, unless proof is given that it had been so taken (A.-G. *v.* Cleeve cited Ros. N. P. 54).

Admissible.	*Inadmissible.*
A. (the owner) or B. (the contractor) is liable for work done to a house by C., on B.'s order; —evidence that A. paid B. for the work is admissible in A.'s favour as showing the *bona fides* of his defence, and that it was not a mere attempt to avoid payment (Gerish *v.* Chartier, 1 C. B. 13; and see Milne *v.* Leisler, 7 H. & N. 786; and Baden *v.* Kyverberg, 2 M. & W. 61).	
The question being whether A. libelled B. by describing him as a swindler;—a report to the same effect made by the French police, upon which A. founded his statements, held admissible to show the *bona fides* of A.'s defence, though not to justify the libel or prove its truth (R. *v.* Labouchere, 14 Cox 419; *post*, p. 151; but see Scott *v.* Sampson, 8 Q. B. D. 491).	
(*h*) A. (a parishioner) pays a sum of money as tithes to B. (a rector). This is an admission by conduct against A. that B. is entitled to the tithes (James *v.* Bion, 2 Sim. & St. 606; Chapman *v.* Beard, 3 Anstr. 942).	(*h*) A. (a parishioner) pays a sum of money as tithes to B. (a rector). This is not an admission by conduct against B. that A. owes him the tithes (James *v.* Bion, *supra*).
The question being whether A. caused injury to B.;—the fact that B. had ascribed her injuries to an accident, and not to A.; and the fact that her husband and her solicitor's clerk had conspired to suborn false witnesses at the trial, are relevant as admissions by conduct that B.'s claim is bad; and in rebuttal B. may prove that no such accident or subornation as alleged had taken place (Melhuish *v.* Collier, 15 Q. B. 878; Moriarty *v.* L. C. & D. Co., L. R. 5 Q. B. 314).	
(*i*) The question being whether A. and B. were lawfully married; —the fact that they were always visited and received as man and wife by the respectable families in the neighbourhood is admis-	(*i*) The question being whether A., a deceased testator, was sane at the time of making his will; —the facts that his friends and relations treated him as sane in their correspondence, and that

Admissible.	*Inadmissible.*
sible (Tay. s. 578; *post*, Reputation).	he was publicly elected to a responsible office, are inadmissible (Wright *v.* Tatham, 7 A. & E. 313). So, the fact that they treated him as insane; though the fact that he was seen under restraint in an asylum, was admitted in Martin *v.* Johnson, 1 F. & F. 122. The question being as to the seaworthiness of a ship;—the facts that the captain after a thorough examination of the ship embarked in her with his family, and that the underwriters, after her loss, paid the policy-moneys on the footing of her seaworthiness, are inadmissible (Wright *v.* Tatham, *supra*). The question being whether A. had committed an act of bankruptcy at the time B. supplied him with goods;—the fact that other persons who had supplied A. with goods about the same time had afterwards returned them to A.'s assignee in bankruptcy, is inadmissible (Backhouse *v.* Jones, 6 Bing. N. C. 65).

CHAPTER IX.

FACTS RELEVANT TO CONNECT THE PARTIES WITH THE TRANSACTION.

WHEN an act has been proved, and the question is whether a given party is, or is not, its doer, the following facts are relevant:—

Previous Conduct and Declarations.—The presence or absence of motive, means and opportunity, preparation or previous attempts on his part to do the act; his knowledge of circumstances enabling him to do it; and his declarations of intention, or threats uttered with the same view.

Alibi.—So, the fact that he was in the neighbourhood, or elsewhere about the time the act was done.

Subsequent Conduct and Confessions.—In the same way, the presence or absence of facts showing a consciousness of having done the act may be proved—*e.g.* (in criminal cases), change of demeanour or mode of life; flight; the fabrication or suppression of evidence; the giving of false names, addresses, and explanations; or the possession of documents or property connected with the transaction. [Even documents and property found at his abode *after* his arrest are evidence against a prisoner, if their previous existence may be inferred from the circumstances (Tay. s. 595). So, letters invited by and addressed to him, but which have been *intercepted* at the post-office, are receivable, the postmaster being the agent of the recipient: R. *v.* Cooper, 1 Q. B. D. 15.] As to *confessions*, see p. 154.

Acts of Others.—It is also relevant for the accused to show that the act was more likely to have been done by others than himself; and the prosecution may rebut such evidence (R. *v.* Dytche, 17 Cox 39).

[Best, ss. 91–92, 452–467; 3 Russ. Ev. 385–387; Ros. Cr. 19–24; Steph. art. 7; Whart. Presumptions in Criminal Cases; 1 Cr. Law Mag. Am. p. 27.]

EXAMPLES.

Admissible.

The question being whether A. murdered B., the following facts are relevant:—The fact that B., shortly before the murder, had given evidence against A. on a criminal charge, and the depositions containing the evidence (R. *v.* Buckley, 13 Cox 293; R. *v.* Shippey, 12 Cox 161); that A. had been heard to declare that he would be revenged on B.; that a few days before the murder A. had bought a knife which might have caused the fatal wound; that A. knew of habits of B. which would enable him readily and secretly to commit the murder (Steph. art. 9, illus. (*e*)); that both before and after the crime A. was observed near the spot (in explanation A. may prove that he had an independent reason for being there: R. *v.* Bernard, 19 St. Tr. 815; Prindle *v.* Glover, 4 Conn. 266); that marks corresponding with the impressions made by A.'s boots were traceable near the body of B.; that after the crime A. absented himself from home; and that he gave inconsistent accounts of his whereabouts on the day of the murder.

[Best, s. 92.]

The question being whether A. murdered B. by the explosion of grenades;—the fact that the grenades were ordered by C., and the contents of a letter from C. (indicating hostility to B.) found at A.'s lodgings after his arrest, and bearing a memorandum in A.'s handwriting, are admissible

Inadmissible.

The question being whether A. murdered B., the following facts are irrelevant:—The fact that A. was a man of bad character (*post*, Character); that he belonged to a people notoriously reckless of human life and addicted to assassination; that on a former occasion he narrowly escaped being convicted for the murder of another person; that much jealousy and ill-feeling existed between A.'s nation and B.'s nation; that on the same spot, a year before, one of the former murdered one of the latter in exactly the same manner (*post*, Similar Facts); that B. was found to have been robbed, and that A. was well known to be avaricious; that A. had been heard in his sleep to use language implying that he was the murderer (*post*, Confessions); that all A.'s neighbours believed him guilty (*post*, Reputation and Opinion); that both Houses of Parliament had voted addresses to the Crown in which A. was assumed to be guilty (*post*, Public Documents).

[Best, s. 92.]

The question being whether A. and B. had stolen certain shawls;—the fact that an inventory of the shawls, not in A.'s handwriting, but contained in an envelope on which he had written "A.—private," was found in a bag which A. said belonged to B., in a room in which they both lodged,—

Admissible.	*Inadmissible.*
against A. (R. *v.* Bernard, 1 F. & F. 240).	held inadmissible, on the ground that the indorsement on the envelope might have been written prior to the enclosure (R. *v.* Hare, 3 Cox 247, *sed qu.*, and see *note* to this case, 3 Russ. Cr. 387).
A. is charged with wounding a constable;—it is competent for him to give in evidence facts showing that B. C. & D. were more likely to have committed the crime than he; and B. C, and D. may deny on oath the facts alleged (R. *v.* Dytche, 17 Cox 39; in this case B. C. and D. had been convicted and were suffering imprisonment for the crime).	The question being whether A. (residing in London) had fitted out a vessel to be employed in the slave-trade abroad;—slave-trading papers found on board at one (not the first) of the foreign ports at which the vessel touched, but which papers were not otherwise traced to A.'s knowledge, held inadmissible to connect him with the transaction, as the papers might have been introduced at some intermediate port without A.'s knowledge (R. *v.* Zuleta, 1 C. & K. 215).

CHAPTER X.

FACTS RELEVANT TO PROVE STATES OF MIND.

WHEN the state of mind of the parties with reference to a transaction is material, all facts from which it may be inferred, though previous, subsequent, or extrinsic to such transaction are admissible.

In some cases, however, what were originally matters of logical inference have gradually hardened into rules of law, of arbitrary application and effect.

KNOWLEDGE AND NOTICE.[a]—Actual knowledge, which is generally a primary element in determining more complex states of mind, may be inferred from the fact that a party had reasonable means of knowledge—*e.g.*, *possession of documents* containing the information, especially if he has answered, or otherwise acted upon, them; or from the fact that such documents, properly addressed, have been delivered at, or posted to, his residence. (As to documents found after the arrest of a prisoner, or intercepted at the post, see *ante*, p. 60.) So, *execution* of documents will imply knowledge of their contents (*e.g.*, of a deed: *Re* Cooper, 20 Ch. D. 611; or a will: Tay. s. 160), though mere *attestation* will not (Harding *v.* Crethorne, 1 Esp. 58). *Access* to documents may also, sometimes, raise a presumption of knowledge—*e.g.*, in the case of the rules of a club, or books kept between partners (though the inference here is not invariable: Lindley, Partnership, 536; and see *post*, Admissions by Partners;) master and servant; trader and shopman; banker and customer (Tay. s. 812). This presumption, however, does not apply in the case of directors (Hallmark's case, 9 Ch. D. 329), or shareholders (Lindley, Company Law, 312), as to the books of a company. Knowledge may likewise be imputed where it is a party's *duty to know* (Hallmark's case, *supra;* Mackintosh *v.* Marshall, 11 M. & W.

116; as distinguished from a mere right to inspect: Hill *v.* Manchester W. Co., 5 B. & Ad. 866; Corp. of Waterford *v.* Price, Ir. L. R. 310). So, the publication of a fact in a *Gazette or newspaper* is receivable to fix a party with notice; though (unless the case is governed by statute) it is always advisable, and sometimes necessary, to furnish evidence that the party to be affected has probably read the paper—*e.g.*, that he takes it in, or attends a reading-room where it is taken, or has shown knowledge of other matters contained in the same number, or that it is a publication with which it is his duty to be familiar; but the mere fact that the paper circulates in his neighbourhood is no proof (Tay. ss. 1665–1666; Whart. ss. 671–675). In rebuttal, evidence might of course be given that the party is unable to read.

The *notoriety* of a fact in a party's calling or vicinity may also in some cases support an inference of knowledge (Preston's case, 2 Den. C. C. 353; and Steph. art. 11, illus. (*j*)); though mere *rumour*, or *reputation*, is inadmissible (Greenslade *v.* Dare, 20 Beav. 284; R. *v.* Gunnel, 16 Cox 154).

Constructive Notice has been defined as a presumption of knowledge which will not be allowed to be rebutted; and in certain cases arises where a party has had the means of knowledge and might have obtained it, but for his own gross negligence, or wilful abstention. In such cases whatever is sufficient to put a person of ordinary prudence on inquiry is constructive notice of all to which that inquiry would lead. Thus, claiming under, or contracting with, a party who derives his title from an instrument is constructive notice of its contents. So, notice of a deed, or a trust, is notice of its terms (Patman *v.* Harland, 17 Ch. D. 353; but see Williams *v.* Williams, *id.* 443). And the acceptance of a contract in a common form without objection is constructive notice of its contents (Watkins *v.* Rymill, 10 Q. B. D. 178). See fully, 2 Watson, Eq. 1149–1156; Chitty, Eq. Ind. "Notice"; Brett, L.C. in Eq. 260; and as to notice to a party's solicitor or agent, *ante*, p. 40).

GOOD AND BAD FAITH.[(b)]—A party's good faith in doing an act may generally be inferred from any facts which would justify its doing (Whart. s. 35). In such cases the information (whether true or false) on which he acted will often be material.

So, to show the *bona fides* of a party's belief as to any matter, it is admissible to show the state of his knowledge, and that he had reasonable grounds for such belief (Derry *v.* Peek, 14 App. Cas. 337); *e.g.*, that it was shared by the community, or even by individuals similarly situated to himself (Sheen *v.* Bumpstead, 2 H. & C. 193; see *ante*, Standards of Comparison and Facts showing Good Faith). While the absence of reasonable grounds of belief in the existence of a fact (*e.g.*, means of knowing the opposite) is evidence of want of honest belief (Derry *v.* Peek, *supra*).

The relative positions and circumstances of the parties are often material in determining their good or bad faith in a transaction; a higher standard of probity being demanded from either when the other is, *e.g.*, of weak intellect, intoxicated, illiterate, or acting under duress or fear; or occupies the position of child, ward, client, or patient to the other.

FRAUD.—When fraud is in issue, the particulars of it have generally to be pleaded, and the question of their sufficiency often becomes one of law. As to the distinction between facts which constitute fraud and those that are only evidence of it, see Derry *v.* Peek, *supra*.

Concealment of Material Facts (*e.g.*, those affecting title or risk) by either party to a contract is evidence of fraud. A vendor, however, is not bound to disclose every defect in the property sold; nor *à fortiori* is a purchaser bound to disclose facts which would increase its value; and where there is no obligation to divulge, the *passive acquiescence* of either in the other's mistake is not evidence of fraud (Smith *v.* Hughes, L. R. 6 Q. B. 597; see Ward *v.* Hobbs, 4 App. Cas. 13). On the other hand, *gross*, but not slight, *inadequacy of price* may be.

Misrepresentation of Material Facts may of itself be perfectly innocent, but it becomes fraudulent if made (1) *knowingly*, or (2) *without belief in its truth*, or (3) *recklessly* without care whether true or false (Derry *v.* Peek, *supra;* see Directors' Liability Act, 1890).

[Ros. N. P. 633–635, 847–855; Moncrieff on Fraud and Misrepresentation; Kerr on Fraud and Mistake.]

MALICE.[c]—Malice in doing an act has generally to be proved by the previous or subsequent conduct and relations

of the parties—*e.g.*, previous enmity, threats, quarrels, and violence; while in rebuttal previous expressions of good-will and acts of kindness may be shown.

Malice may even be implied from the manner in which an action is conducted in which it is in issue; and in cases of libel the mode of publication, or the repetition of the libel, is material to show the defendant's *animus* (Tay. ss. 340–347).

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) The question being whether A., at the time of committing an act of bankruptcy, knew of the state of his affairs;—letters found in his possession after the act of bankruptcy, but bearing post-marks before it, and containing refusals to lend him money with which to pay his debts, are admissible to show his knowledge of the matters referred to, though not the truth of the facts stated (Vacher *v.* Cocks, M. & M. 353; Cotton *v.* James, M. & M. 275).	(*a*) The question being whether A., a director of a company, knew that his name was inscribed on the share register;—the mere facts that A. attended meetings of the company and acted as director are no proof of such knowledge (Hallmark's case, 9 Ch. D. 329).
The question being whether A., at the time of making a contract with B., knew that the latter was insane;—evidence of B.'s conduct both before and after the transaction is admissible, as showing that his lunacy was of such a character as must have been apparent to A. (Beavan *v.* McDonnell, 10 Ex. 184; Lovatt *v.* Tribe, 3 F. & F. 9).	The question being whether A. knew, at a certain time, that B. was insane;—the fact that B. was generally reputed to be insane in the neighbourhood in which A. and B. lived at the time in question is inadmissible (Greenslade *v.* Dare, 20 Beav. 284).
The question being whether A., the owner of a dog, knew of its mischievous propensities;—the facts that he had offered to pay compensation to a person it had bitten, and had warned another person to beware of it, are admissible (Thomas *v.* Morgan, 2 C. M. & R. 496; Judge *v.* Cox, 1 Stark. 285. So, also, the fact that complaints of the dog had been made to A.'s servant	

Admissible.

who had charge of the dog, though *aliter* as to a servant who had not such charge: *ante*, pp. 43–44).

(*b*) The question being whether A. and B., the vendors of a mine, falsely represented its value to C.;—conversations between A. and B. (not in C.'s presence) regarding the state and prospects of the mine, and books kept by their mining agent and his clerk, in the ordinary course of duty, at the mine, are admissible in favour of A. and B. to show their *bona fides* in making the representations (Shrewsbury *v.* Blount, 2 M. & Gr. 475. *Aliter* as to books kept by the agent not in the course of his duty).—A. and B. are charged with conspiring to defraud C. by representing that A. owned certain property; B.'s defence is that he honestly believed the representations, being himself the dupe of A.;—letters between A. and B. (not communicated to C.) prior to the completion of the transaction, and regarding it, held admissible in B.'s favour (R. *v.* Whitehead, 1 Dowl. & Ry. 61; *aliter* as to letters between A. and B. written subsequently to the transaction).

The question being whether A. acted in good faith in representing W., a tradesman, to be solvent, whereby B. trusted W., and suffered damage;—the fact that W. had sold goods to A. under cost price is admissible, as negativing A.'s good faith; the fact that A.'s shopman, who was cognizant of the transactions between A. and W., believed W. to be solvent; and that other individual tradesmen in the same town who had dealt with W. also believed him to be solvent; and that there was a general reputation in the town that W. was solvent,

Inadmissible.

The question being whether A. intended to deceive B. by pretending to tell his fortune by the stars; evidence that A. or others *bonâ fide* believed in his ability to tell such fortunes is inadmissible (Penny *v.* Hanson, 18 Q. B. D. 478; Denman, J., remarked, "We do not live in times when sane men can believe in such powers." And see Lewis *v.* Fermor, *ibid.* 532, *per* Wills, J.).

Admissible.	*Inadmissible.*
are admissible in A.'s favour as showing his good faith (Sheen *v.* Bumpstead, 2 H. & C. 193).—The question being whether A. gave credit to B., a married woman, believing her to be single;—the fact that B. had represented herself to other tradesmen as single, in such a way as to reach A.'s ears, is admissible in A.'s favour (Barden *v.* Kyverberg, 2 M. & W. 61).	
(*c*) The question being whether A. acted maliciously in prosecuting B.;—an affidavit filed by the clerk to A.'s solicitor, and used for the purpose of preventing persons becoming bail for B. when he was arrested, is admissible as showing A.'s malice (Taylor *v.* Williams, 2 B. & Ad. 845).	(*c*) The question being whether A. acted maliciously in prosecuting B.;—the fact that the case was dismissed by the Court for want of prosecution, is no evidence of malice on A.'s part (Purcell *v.* Macnamara, 9 East 361).
A. is charged with murder;—the fact that he was drunk at the time is admissible, as tending to rebut his intention to kill (R. *v.* Doherty, 16 Cox 306).	In an action for libel against A. for stating that B. had proved incompetent as a surveyor in a certain transaction;—the fact that B. was generally competent as a surveyor is not admissible to prove A.'s malice (Brine *v.* Bazalgette, 3 Ex. 692).

CHAPTER XI.

SIMILAR FACTS.

When Directly Relevant.

GENERALLY speaking, it is not admissible to prove the main fact by showing that facts similar to it, but not part of the same transaction, have occurred on other occasions. Nor, when an act has been proved, to show that a given party did the act may evidence be tendered of similar acts done either by *himself*, with the object of showing a disposition, habit, or propensity to commit, and a consequent probability of his having committed, the act in question; or by *others*, though similarly circumstanced to himself, to show that he would be likely to act as they.

[For converse cases see Course of Business, p. 47, and Character, p. 81.]

Grounds of Exclusion.—Facts of this class, though often not destitute of moral weight, are rejected as legal evidence on grounds of convenience, since they tend to embarrass the inquiry with collateral issues, prejudice the parties with the jury, and encourage attacks without notice.

The maxim "*Res inter alios actæ alteri nocere non debent*" is frequently supposed to express the principle of exclusion in such cases; but this is incorrect, for similar transactions *inter partes* would be equally inadmissible in this relation. The principle of the maxim appears, indeed, to fail altogether as a test of relevancy, since an examination of the three preceding chapters will show that most of the transactions relevant under them are *res inter alios*, while others

that are irrelevant are *res inter partes*. [See a valuable article on this maxim by Mr. C. H. Barrows, 1 Am. Law Rev. 350. As to the operation of the exclusionary principle expressed by it in relation to other branches of evidence, see *post*, Judgments, and Testimony in Former Trials. Mr. Justice Stephen remarks: "The application of the maxim to the law of evidence is obscure, because it does not show how unconnected transactions may be supposed to be relevant to each other. . . . . In its literal sense the maxim also fails, because it is not true that a man cannot be affected by transactions to which he is not a party; illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life would supply them" (Dig. *note* vii.). The maxim has its principal utility in the domain of substantive law. See also Best, ss. 112, 506–510; and notes to the latter sections in Chamberlayne's Amer. ed.; Broom's Legal Maxims, 908].

EXCEPTIONS.—The admissibility of similar facts as direct proof of the fact in issue depends, not on personal, but logical privity; and is mainly a question of degree, or of our knowledge and understanding of the causes of events, as to which in many cases the progress of science may change the law. In proportion as the element of personality, the interjection of the free-will of the human being diminishes, we become more certain of the effects of a causative force, and more ready to admit such evidence (1 Am. Law Rev. 350, 358). Even where the personal element is absent, however, the presumption from similarity must be sufficiently cogent to outweigh the practical inconveniences against which the rule is aimed (Metropolitan Asylum District *v.* Hill, 47 L. T. (H. L.) 29).

Insanity.—On questions of insanity, the conditions of mental disease are sufficiently determined to justify the reception of similar facts and conduct in proof of the main fact (Tay. s. 337; Pope on Lunacy, 392).

Physical Aptitude and Personal Identity.—Moreover, in the application of the rule, a distinction is to be drawn between psychological tendency and physical aptitude, similar facts showing the latter being sometimes receivable where those implying the former would be excluded (Whart.

Presumptions in Criminal Cases, 1 Cr. Law. Mag. Am. p. 27). Personal identity is also, in many cases, necessarily provable by such evidence (see also, Alibi, p. 77).

Agency.—So, in cases of agency (Blake *v.* Albion Ass. Co., 4 C. P. D. 94, *per* Coleridge, C.J.).

Title.—And on questions of title, repeated acts of ownership with respect to the *same* property are receivable; and even acts done with respect to *other places* connected with the *locus in quo* by "such a common character of locality as to give rise to the inference that the owner of one is likely to be the owner of the other," are sometimes receivable (Jones *v.* Williams, 2 M. & W. 326, *per* Parke, B.; Bristow *v.* Cormican, 3 App. Cas. 641; Neill *v.* Devonshire, 8 App. Cas. 135; Tay. ss. 322–325; Ros. N. P. 85–86, 931).

Manorial and Trade Customs.—Although the customs of one *manor* are not, in general, proof of the customs of any other manor, since each may have customs peculiar to itself, yet where the original unity or identity of the manor is established, or the same tenure is shown to prevail in both, such customs become reciprocally admissible (Tay. ss. 320–322; Ros. N. P. 85–86).

So, to prove the custom of a given trade, customs of the *same* trade, or even of *analogous* trades, in other localities, are receivable.

Propensities of Animals.—Where the doings of animals are in question, it is admissible to prove, not only the general propensities of the species, but the doings of the *same* animal on other occasions, and even those of *other* animals of the same species.

Physical and Mechanical Agencies.—The operation of physical, natural, or mechanical agencies may, in like manner, often be inferred from their action, under similar conditions, at other times and places; while if the similarity of conditions is not sufficiently established, the evidence will be rejected (Folkes *v.* Chadd, 3 Doug. 157; Hawks *v.* Charlemont, 10 Mass. 110; Metropolitan Asylum District *v.* Hill, *supra*). As to the regularity of scientific instruments, see Tay. s. 183.

[Tay. ss. 317–326; Best, ss. 506–510; Ros. N. P. 84–86; Powell, 528–535; Steph. art. 10; Whart. s. 29, and Presumptions in Criminal Cases, *supra;* Broom's Legal Maxims, 908.]

EXAMPLES.

Admissible.

The question being whether A. was insane at a certain time; —evidence that he exhibited symptoms of insanity prior and subsequent to such time, and that his ancestors and collaterals had been insane, is admissible (Pope on Lunacy, 392).

A. is indicted for the murder of B., under circumstances which show that the crime must have been committed by a left-handed man, or a skilful mechanic, or a person with surgical knowledge;—the fact that A. possessed similar attributes is admissible to prove that he committed the murder (Whart. Presumptions in Criminal Cases; *supra*, p. 70).

A. claims property to which he would be entitled if he could prove his identity with B.;—evidence of their similarity of name, residence, occupation, handwriting, physical and mental characteristics, educational acquirements, previous history, &c., is admissible (R. *v.* Orton, *passim;* Whart. ss. 1273, 1287; Tidy's Legal Medicine, "Personal Identity").

The question being whether A. signed a certain document as agent for B.;—the facts that A. had signed other documents for B., and that B. had adopted such signatures, are admissible (Blake *v.* Albion Ass. Co., 4 C. P. D. 94; *aliter* if such adoption is not proved: Courteen *v.* Touse, 1 Camp. 43, *n.*; though see Neal *v.* Irving, 1 Esp. 60, and Watkins *v.* Vince, 2 Stark. R. 368. —An admission of liability on one bill accepted by the same agent is, however, no evidence of a general authority to accept: Llewellyn *v.* Winckworth, 13

Inadmissible.

The question being whether A., a brewer, sold good beer to B., a publican;—the fact that A. sold good beer to other publicans is inadmissible (Holcombe *v.* Hewson, 2 Camp. 391. *Aliter* if all the beer had been of the same brewing).

The question being whether A. made a contract with B. subject to a certain qualification;—the fact that A. had made contracts with other persons subject to the same qualification is inadmissible (Hollingham *v.* Head, 4 C. B. N. S. 388. *Aliter* if A. testified that he had made the same contract with all: Spenceley *v.* De Willott, 7 East 108). So, the terms on which A. let land to B. are no evidence of the terms on which A. let land to other tenants (Carter *v.* Pryke, Peake 95; unless a general custom be proved: *ante*, p. 47). And to show that a tradesman had given credit to A.'s father and not to A.;—evidence that other tradesmen had given credit to A.'s father under similar circumstances is not receivable (Smith *v.* Wilkins, 6 C. & P. 180).

To prove that a medical man had been negligent in performing a certain operation, evidence of his negligence or skill in other cases is inadmissible (R. *v.* Whitehead, 3 C. & K. 202). So, the question being whether A. had forged B.'s signature to a bill of exchange;—the fact that he had forged B.'s signature to other bills cannot be received (Viney *v.* Barss, 1 Esp. 293; though *aliter* if all the bills belonged to the same collection: Griffith *v.* Payne, 11 A. & E. 131). —And where the question was

Admissible.

M. & W. 598; Morris *v.* Bethell, L. R. 5. C. P. 48; though it is admissible to confirm independent proof of such authority).

In an action by A. against B. for work done to certain houses on the orders of C.;—it is admissible, in order to prove that B. is the owner of the houses and the real principal, to show that other persons had (although unknown to A.) received orders from B. for work done to the same houses (Woodward *v.* Buchanan, L. R. 5 Q. B. 285. *Aliter* as to orders for work done at other houses).

The question being whether the Crown had the right of appointing a coroner within the honour of Pontefract, in the Duchy of Lancaster;—evidence of its appointment of coroners, and of their acting in other parts of the duchy without the honour of Pontefract, is admissible (Jewison *v.* Dyson, 9 M. & W. 540).—So, on the question whether a certain payment was a farm *modus*, evidence of similar payments by other farms in the same township is admissible to disprove such *modus* (Blundell *v.* Howard, 1 M. & S. 292).—So, to prove that a slip of waste land bordering a road belonged to the lord of the manor, and not to the owner of the adjacent land;—the fact that the lord owned other parts of the slip bordering the same road is admissible [Doe *v.* Kemp, 7 Bing. 332. *Aliter* as to slips bordering other roads in the parish.—The same principle applies in the case of rivers, lakes, mines, woods, hedges, continuous walls, and the like].

The question being whether a certain custom prevailed in the cod-fisheries of Newfoundland;

Inadmissible.

whether A. had committed a certain crime, his admission that he had committed similar crimes, and had a tendency to commit crimes of that description, was rejected (R. *v.* Cole, 1 Phil. Ev. 508).

Admissible.	*Inadmissible.*
—the fact that the same custom prevailed in the cod-fisheries of Labrador is admissible (Noble *v.* Kennoway, 2 Doug. 510). So, to prove a custom of the bleaching trade at Loughboro', evidence that the same custom existed in the bleaching trade at Nottingham, fourteen miles distant, is admissible (Plaice *v.* Alcock, 4 F. & F. 1074). So, to prove a custom of the fruit trade in London, the existence of a similar custom in the colonial trade is admissible (Fleet *v.* Murton, L. R. 7 Q. B. 126).	
The question being whether A.'s dog killed a sheep belonging to B.;—the fact that the *same* dog had killed other sheep on different occasions belonging to other people is admissible (Lewis *v.* Jones, 49 J. P. 198, 1 Times L. R. 153).—So, to prove that A.'s horse was frightened by a certain obstruction on a highway;—evidence is receivable that *other* horses were frightened by the same obstruction (Browne *v.* G. E. R., 22 Q. B. D. 391).	
The question being whether A. murdered B. by poison;—proof that C. and D., to both of whom A. had access, had (the one previously and the other subsequently to B.'s death) died from the same poison is admissible to show that B.'s death was caused by that poison (R. *v.* Geering, 18 L. J. M. C. 215; R. *v.* Flanagan, 15 Cox 403. *Aliter* if A. was not proved to have had access to C. and D.; see *post*, p. 78).	The question being whether A. murdered B. by poison;—proof that C. and D., to whom A. had access, had both died from the same poison is not admissible to show that A. administered the poison to B. (R. *v.* Geering, *supra*).
The question being whether A.'s land was injured by noxious discharges from B.'s works;—proof that B.'s works had, or had not, injuriously affected neighbouring lands similarly situated to A.'s is admissible (Tennant *v.* Hamilton, 7 C. & F. 122; R. *v.* Neville,	The question being whether an obstruction to a harbour was caused by the erection of a sea-wall in its vicinity;—evidence that similar obstructions occurred at some other harbours on the same coast which were in the vicinity of sea-walls held inadmissible, as an attempt *litem lite*

Admissible.

1 Pea. N. P. C. 91 ; R. *v.* Fairrie, 8 E. & B. 486).

The question being whether a small-pox hospital, managed by a certain corporation had communicated disease to residents in the neighbourhood ;—evidence that *other* small-pox hospitals, not managed by the corporation, had, or had not, communicated disease to residents in their respective neighbourhoods is admissible, and of more or less weight according as the management of the others is, or is not, shown to have been similar to that of the corporation (Metropolitan Asylum District *v.* Hill, 47 L. T. H. L. 29).

The question being whether A.'s premises were ignited by sparks escaping from a railway engine ;—proof that (1) the *same* engine, and (2) *other* engines of similar construction, belonging to the same company, had previously caused fires along the same line is admissible (Aldridge *v.* G. W. R., 3 M. & Gr. 522; Piggott *v.* E. C. R., 3 C. B., 229; and see Whart. ss. 42–43).

Inadmissible.

resolvere [Folkes *v.* Chadd, 3 Doug. 157. A scientific witness had given his opinion that the sea-wall had not caused the obstruction in question, and been allowed to support such opinion by proof that in some cases, along the same coast, harbours near sea-walls were not obstructed. See a discussion of this case in Metropolitan Asylum District *v.* Hill, *supra*].—So, the question whether the removal of certain stones from a river had caused the latter to wash away the plaintiff's land ;—evidence that the removal of stones from another part of the river had had the same effect was rejected as tending to mislead the jury, no satisfactory proof being given that the conditions of the two occurrences were the same [Hawks *v.* Charlemont, 110 Mass. 110. In Presbrey *v.* Old Colony Co., 103 Mass. 1, 9, the price of neighbouring land, similarly conditioned to that in dispute, was rejected as a measure of value. See, also, Comm. *v.* Piper, 120 Mass. 185, cited *post*, Opinions of Experts, examples (*c*)].

CHAPTER XII.

SIMILAR FACTS.

When Indirectly Relevant.

SIMILAR facts, though, as we have seen, generally inadmissible as direct proof, are frequently receivable (after evidence *aliunde* of the main fact has been given: R. *v.* Francis, L. R. 2 C. C. R. 128), to show the state of mind of the parties with reference to it, or to explain its character, or for other collateral purposes. Thus,—

Knowledge.—A party's knowledge of the nature of a particular transaction—*e.g.*, that an agency was dangerous, a representation false, or money passed counterfeit—may always be so proved. And under 34 & 35 Vict. c. 112, s. 19, to show the defendant's knowledge, at the time of his receipt or possession of property, that it was stolen, it is admissible to prove,—(1) That other property, stolen within twelve months, was found in his possession (*at the time* of finding the stolen property in question: R. *v.* Drage, 14 Cox 85; R. *v.* Carter, 12 Q. B. D. 522); (2) That the defendant was convicted of an offence involving fraud or dishonesty within the preceding period of five years. [Seven days' notice in writing must be given of the intention to prove such conviction.]

Intention or Accident.—To show that an act, proved *aliunde*, was intentional and not accidental, similar acts, implying system, and done by the same party, or even not shown to have been done by him, are admissible. And in rebuttal, evidence is probably receivable that such other acts were themselves accidental (Steph. art. 12, *note*).

Fraud and Malice.—So, to prove that a given transaction

was fraudulent or malicious (Blake *v.* Albion Assurance Company, 4 C. P. D. 94; Huntingford *v.* Massey, 1 F. & F. 690).

Motive.—It seems doubtful whether such evidence is admissible to prove motive for a crime (see for its admission, R. *v.* Heeson, 14 Cox 40; *contra*, R. *v.* Flanagan, 15 Cox 403).

Alibi.—To rebut an *alibi*, or even independently to establish the identity of a prisoner as having been in the vicinity of the crime, it is admissible to show that he was engaged in similar crimes about the same time and place (Tay. s. 325; 3 Russ. Cr. 382).

Witnesses and Documents.—Similar facts are also sometimes admissible in order to corroborate the testimony, affect the credit, or illustrate the opinions of witnesses (*post*, Facts affecting Witnesses), or to explain the meaning of documents.

[Tay. ss. 327–348; Ros. Cr. Ev. p. 87 *et seq.*; Steph. arts. 11–12.]

EXAMPLES.

Admissible.	*Inadmissible.*
The question being whether A. uttered coin knowing it to be counterfeit;—the facts that other counterfeit coins were found in his possession, and that he had *previously* or *subsequently* uttered counterfeit coins of the same or different descriptions, are admissible to show his knowledge, although such utterings are themselves the subject of separate indictments (R. *v.* Foster, Dear. 456; R. *v.* Weeks, L. & C. 18; Tay. s. 345).	The question being whether A. uttered a forged note knowing it to be forged, and evidence having been given of the uttering of other forged notes by him, and of his conduct at the time of such utterings;—the conduct and statements of A. *not* at the time of such utterings, though with reference thereto, are inadmissible (R. *v.* Phillips, 1 Lew. C. C. 105; R. *v.* Cooke, 8 C. & P. 586, *sed qu.*; *contra*, R. *v.* Forbes, 7 C. & P. 224; and see R. *v.* Brown, 2 F. & F. 559, in which the evidence was rejected, but with strong doubts).
The question being whether A. attempted to obtain money from B. by falsely pretending that a certain ring was a diamond ring;—the facts that A. had *previously* attempted to obtain money from other persons by false representations as to the	The question being whether A. obtained money from B. by falsely pretending that C. had authorized him to collect the money;—the fact that A. *subsequently* obtained money from D., by a similar false pretence, held inadmissible to show A.'s

Admissible.

genuineness of other rings and jewellery is admissible to show his knowledge that the ring in question was not genuine (R. *v.* Francis, L. R. 2 C. C. R. 128; R. *v.* Cooper, 1 Q. B. D. 19).

The question being whether A. murdered B. (her husband) by poison;—the fact that other members of B.'s family, to whom A. had access, died (some previously, and others subsequently, to B.'s death) from the same poison is admissible, after proof of administration of the poison by A. to B., to show that such administration was *intentional*, and *not accidental* (R. *v.* Geering, 18 L. J. M. C. 215; R. *v.* Garner, 3 F. & F. 681; R. *v.* Cotton, 12 Cox 400; R. *v.* Heeson, 14 Cox 40. *Aliter* if A. were not shown to have had access to the others: R. *v.* Flanagan, 15 Cox 403; *ante*, p. 74).

The question being whether A. set fire to his house accidentally or intentionally, in order to obtain the insurance money;—the fact that previous attempts (not shown to have been by A.) had been made to set fire to the same house (R. *v.* Bailey, 2 Cox 311); and the facts that two other houses, in which A. had previously lived, had been burned down, and that he had obtained the money for which they had been insured,—are admissible [R. *v.* Gray, 4 F. & F. 1102. Mr. Justice Stephen, in a note to this case (Dig. art. 12), states that "he acted upon it in the case

Inadmissible.

knowledge that he had no authority on the occasion in question [R. *v.* Holt, Bell C. C. 280. No reasons are given for the decision; but in R. *v.* Francis, *supra*, Blackburn, J., remarked of R. *v.* Holt, "The alleged false pretence was an assertion of authority to receive the money, and the question was, authority or no authority; the evidence was wholly irrelevant." See Steph. art. 11, illus. (*d*)].

Admissible.	*Inadmissible.*
of R. *v.* Stanley, Liverpool Summer Assizes, 1882, but greatly doubts its authority,—the objection to the evidence being that it may practically involve the trial of several distinct charges at once, as it would be hard to exclude evidence that the other fires were accidental." See also Tay. ss. 346-347. This objection, however, applies in some degree to all collateral facts].	
The question being whether the suffocation of an infant by its mother was intentional or accidental;—evidence is admissible that four other children of the same mother had died early from causes unknown (R. *v.* Roden, 12 Cox 630; see R. *v.* Dale, 16 Cox 703, as to intent or accident in procuring a miscarriage).	
The question being whether an insurance company obtained a premium from A. by fraudulently allowing its agent to pretend that if A. insured he would obtain a loan from the company;—the fact that premiums had been obtained by the same agent and means from other persons, to the knowledge and for the benefit of the company, without loans being made, is admissible, as showing the fraudulent character of the transaction in question (Blake *v.* Albion L. A. Co., 4 C. P. D. 94).	
The question being whether a libel written by A. concerning B. was malicious;—evidence of prior and subsequent libels written by A. relating to the same subject-matter, and published to the same or to different persons from those to whom the libel in question was published, is admissible to show	The question being whether a libel by A. against B. was malicious;—evidence of other libels by A. against B., relating to a *different* subject-matter, held inadmissible (Finnerty *v.* Tipper, 2 Camp. 72. But see as to this case, Starkie on Libel, 5th ed. 483).

Admissible.	*Inadmissible.*
A.'s malice (Long *v.* Barrett, 7 Ir. L. R. 439; Pearson *v.* Le Maitre, 6 Scott N. R. 607).	
A. is charged with the murder of B., it being proved that he afterwards obtained money from an insurance on B.'s life;—evidence that A. had caused the death of other persons, and obtained insurance-money in respect of such deaths, held admissible to show A.'s motive for murdering B. (R. *v.* Heeson, 14 Cox 40, *per* Lush, J.).	A. is charged with the murder of B., it being proved that he afterwards obtained money from an insurance on B.'s life;—evidence that A. had caused the deaths of other persons, and obtained the insurance-money therefor, held inadmissible to prove A.'s motive in murdering B. (R. *v.* Flanagan, 15 Cox 403, *per* Butt, J.).
The question being whether A. committed adultery with B. on a certain day;—evidence of subsequent acts of adultery with B., not charged in the petition, held admissible to show the character of acts of familiarity committed between A. and B. on the day in question (Boddy *v.* Boddy, 30 L. J. P. & M. 203. This case seems to carry the principle to an unjustifiable extent, and, under the guise of explanation, to practically allow a physical act to be proved by evidence of subsequent similar acts).	

CHAPTER XIII.

CHARACTER.

CHARACTER IN ISSUE.—When a party's general character is itself *in issue*, proof must necessarily be received of what that general character is, or is not (Tay. s. 355; Best, s. 258). Thus, the question being whether a governess was "competent, lady-like, and good-tempered," while in her employer's service, witnesses were allowed to assert or deny her general competency, good manners, and temper (Fountain *v.* Boodle, 3 Q. B. 5; Brine *v.* Bazalgette, 3 Ex. 692; King *v.* Waring, 5 Esp. 14; Jones *v.* James, 18 L. T. N. S. 243). And even particular instances are in such cases admissible (Best, s. 258).

CHARACTER NOT IN ISSUE.—But where general character is tendered in support of some other issue, it is usually excluded as irrelevant. Thus, in divorce cases, the husband cannot, in disproof of a particular act of cruelty, tender evidence of his general character for humanity (Narracott *v.* Narracott, 33 L. J. P. & M. 61; and see Jones *v.* James, *supra*).

To this rule, however, there are some exceptions, both as to the character of the parties and of the witnesses.

(*a*) Character of the Parties.

Prisoner's Character.—In criminal cases, involving punishment as distinguished from penalty (A.-G. *v.* Bowman, 2 B. & P. 532), the prisoner is, on grounds of humanity, allowed the privilege of proving his *good character*, for the purpose of raising a presumption of his innocence of the crime charged.

The character proved must be of the *specific kind impeached—e.g.*, honesty where dishonesty is charged, good character in other respects being irrelevant (Tay. s. 351).

And it must be *general*, and not relate to *particular instances* of such honesty, &c. (*ibid.*). In strictness, also, it seems that the witness should depose to the prisoner's *reputation* (*i.e.*, the estimate formed of him by the community), and not to his own individual opinion of the prisoner's character or disposition (R. *v.* Rowton, 34 L. J. M. C. 57). But "this distinction is seldom, if ever, acted on in practice, the question always put to a witness to character being, What is the prisoner's character for honesty, morality, or humanity? as the case may be. Nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction" (Steph. *note* xxvi.). As the best character is often the least talked of, the witness may even give *negative* as well as *affirmative* evidence on the subject—*e.g.*, that he has never heard anything *against* the prisoner (R. *v.* Rowton, *supra*). Finally, the character proved must relate to a period *proximate to the date of the charge* (R. *v.* Swensden, 14 How. St. Tr. 596).

Rebutting Evidence.—The prisoner's witnesses to character may (though this is not usual) be cross-examined by the prosecution as to the grounds of their belief, as well as to particular acts or even suspicions of misconduct on his part (R. *v.* Hodgkiss, 7 C. & P. 298; R. *v.* Wood, 5 Jur. 225). And, in rebuttal only, evidence may also be given (though this is rarely done) of the prisoner's *general bad character*; as well as, in certain cases, and before the jury return their verdict, of his *previous conviction* for crime. [The cases are the following:—On a trial for any felony not punishable with death, a previous conviction for felony (6 & 7 Will. IV. c. 111); on a trial for any offence under the Larceny Act, 1861; a previous conviction for felony or misdemeanour (24 & 25 Vict. c. 96, s. 116); on a trial for any coinage offence, a previous conviction under any Coinage Act (24 & 25 Vict. c. 99, s. 37). See also the Prevention of Crimes Act, 1871, ss. 9 and 20.]

Prosecutor's Character.—On charges of rape, or attempts to ravish, the *general bad character* of the prosecutrix is admissible in defence, whether she be or be not cross-examined on the subject (R. *v.* Clarke, 2 Stark. 241). And to show consent, she may be cross-examined as to *other*

immoral acts with the prisoner, and if she denies these they may be independently proved (R. *v.* Riley, 18 Q. B. D. 481). She may also be cross-examined as to such acts with *other men*, but she may decline to answer, and if she deny them, they cannot be independently proved (R. *v.* Cockroft, 11 Cox 410; R. *v.* Holmes, 12 Cox 137).

Character as affecting State of Mind.—It seems doubtful how far a person's character is admissible as evidence of another's state of mind. On a charge of homicide, the bad character of the deceased was received by Willes, J., to show that the prisoner had reasonable grounds for apprehending violence (R. *v.* McCarthy, 3 Russ. Cr. 361, *note j*; and in America such evidence is generally admissible on a plea of self-defence: Whart. Homicide, s. 364). On the other hand, the bad character of a prisoner has been rejected to show that a constable had reasonable grounds for suspecting him of felony (R. *v.* Tuberfield, 1 L. & C. 495; though see *note* to this case, 3 Russ. Cr. 390). So, in actions for malicious prosecution or false imprisonment, the bad character of the plaintiff is not admissible to show reasonable and probable cause on the part of the defendant (Newsam *v.* Carr, 2 Stark. 69; Cornwall *v.* Richardson, Ry. & M. 305; Downing *v.* Butcher, 2 M. & Rob. 374).

Character as affecting Damages.—Character is admissible, in mitigation of damages, in the following cases:—(1) *Defamation.*—The general bad reputation of the plaintiff, but not rumours or suspicions to the same effect as the libel, nor particular facts showing bad character or disposition (Scott *v.* Sampson, 8 Q. B. D. 491; and see Wood *v.* Durham, 21 Q. B. D. 501). In actions for libel and slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant is not entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence (O. 36, r. 37). (2) *Breach of Promise.*—The plaintiff's general character for, and specific acts of, immorality (Foulkes *v.* Sellway, 3 Esp. 236; Baddeley *v.* Mortlock, Holt N. P. 151). Where a general

charge of immorality, and not merely of specific acts, is *pleaded* by the defendant, the plaintiff may, in the first instance, give evidence of general good character as part of her case (Jones *v.* James, 18 L. T. 243). (3) *Seduction.*—Evidence, both of general character for, and previous specific acts of, immorality on the part of the person seduced (Bamfield *v.* Massey, 1 Camp. 460; Dodd *v.* Morris, 3 Camp. 519; Verry *v.* Watkins, 7 C. & P. 308). (4) *Petitions for Damages for Adultery.*—The wife's general character for, or previous acts of, adultery (Smith *v.* Allison, B. N. P. 27; but not subsequent acts, for these might be the effect of the co-respondent's own misconduct: Eslam *v.* Faucett, 2 Esp. 562; Winter *v.* Henn, 4 C. & P. 494; this reason applies also to cases of seduction); as well as the husband's general character for, or particular acts of, infidelity (Bromley *v.* Wallace, 4 Esp. 237), for in such a case he can hardly complain of the loss of that society upon which he has himself placed so little value.

Good character, being presumed, may not be proved in aggravation of damages, but the party attacked may repel general evidence of bad character by general evidence of good character; or evidence of specific acts by disproof of such acts, though he or she may not, it seems, repel evidence of specific acts by evidence of general good character (Jones *v.* James, 18 L. T. N. S. 243; Narracott *v.* Narracott, 33 L. J. P. & M. 61).

[Tay. ss. 356–362; Ros. N. P. 87; Steph. art. 57; Whart. s. 50; Mayne, Damages, 457–467.]

(*b*) Character of the Witnesses.

The character of a witness, whether party or not, is always material as affecting his credit (*post*, Facts affecting Witnesses.)

CHAPTER XIV.

FACTS AFFECTING WITNESSES.

FACTS not directly relevant to the issue may often become indirectly so by tending to *corroborate the testimony, affect the credit*, or *illustrate the opinions* of witnesses.

[As to facts affecting the credit of deceased declarants, see *post*, Statements by Deceased Persons; and as to those illustrating opinions of witnesses, *post*, Opinion Evidence.]

CORROBORATION.—Thus, *similar facts* may become admissible in confirmation of testimony as to the main fact, which would be inadmissible as direct proof—*e.g.*, the question being whether A. was the author of a libel, and a witness having sworn that he received the document from, and returned it to, A., other libels written by A. on the same subject were admitted to confirm the statement of the witness (R. *v.* Pearce, Pea. R. 75;) so the commission of other crimes has been allowed to be proved in corroboration of a prosecutor's evidence as to the identity of a prisoner (R. *v.* Egerton, R. & R. 375, cited by Holroyd, J., in R. *v.* Ellis, 6 B. & C. 148; and see Cole *v.* Manning, 2 Q. B. D. 611, as to previous acts of familiarity to confirm a mother's testimony as to the paternity of her child). So, an admission of liability on a particular bill has been received to confirm testimony as to a general authority to accept bills (Llewellyn *v.* Winckworth, 13 M. & W. 598; Hollingham *v.* Head, 4 C. B. N. S. 388; Morris *v.* Bethell, L. R. 4 C. P. 765); and proof of particular instances to confirm a general course of business (Bourne *v.* Gatcliffe, 11 C. & F. 45, and *ante*, Custom, p. 47).

Previous Similar Statements generally inadmissible.—The fact that a witness has made a previous statement similar to his testimony in court is generally inadmissible either on direct examination to confirm his testimony, or on re-examination to re-establish his credit when impeached by proof of a previous contradictory statement (R. *v.* Coll, 24 L. R. Ir. 522; R. *v.* Coyle, 7 Cox 74; Ros. N. P. 180; Ros. Cr. Ev. 98; Tay. s. 1476). Such evidence, however, is receivable—(1) Where the witness is charged with a design to misrepresent in consequence of his relation to the parties or the cause, in which case it is admissible to show that he made a similar statement before such relation existed (*ibid.*). (2) Where the witness is charged with having *recently fabricated* the story (R. *v.* Coll, *supra*; R. *v.* Coyle, *supra*). (3) On charges of *rape*, or attempt to ravish, the fact that the prosecutrix made a complaint shortly after the outrage, is admissible in confirmation of her testimony (see fully, *ante*, p. 51).

In the above cases, the previous statement is admissible, not to prove the truth of the facts stated, but merely to show that the witness is consistent with himself (R. *v.* Coll, *supra*).

CREDIT.—"The credibility of a witness is compounded of his knowledge of the facts—his disinterestedness—his integrity—his veracity. Proportioned to these is the degree of credit his testimony deserves from the Court or jury," (Archb. Cr. Ev. 296).

Knowledge; Observation; Memory.—Amongst the more obvious matters affecting the weight of a witness's evidence may be classed, his means of knowledge—opportunities of observation—reasons for recollection or belief—powers of memory and perception, and any special circumstances affecting his competency to speak to the particular case,—all of which may be inquired into either in direct examination to enhance, or in cross-examination to impeach, the value of his testimony.

Independent evidence may be given of the following facts, though they are otherwise irrelevant to the issue:—

(1) **Previous Contradictory Statements.**—Every witness upon cross-examination in any civil or criminal proceeding may be asked whether he has made a former state-

ment (or, in cases in which opinion evidence is admissible, expressed a former opinion: Tay. s. 1445) relative to the subject-matter of the case and inconsistent with his present testimony, and if he does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement [17 & 18 Vict. c. 125, s. 23 (civil cases); 28 & 29 Vict. c. 18, s. 4 (criminal cases)].

If the inconsistent statement is *in writing*, it need not be shown to the witness, or proved in the first instance; but where the intention is to *contradict* him by the writing, his attention must first be called to the parts that are to be used for that purpose; provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit [17 & 18 Vict. c. 125, s. 24 (civil cases); 28 & 29 Vict. c. 18, s. 5 (criminal cases)].

Where the *writing is lost, destroyed, or filed in another court*, secondary evidence will be admissible (Tay. ss. 1447–1448; Ros. N. P. 178–179).

If the witness *admits* the contradictory statement, the document may still be proved, either at the instance of the parties or the jury at any time before verdict is given (R. *v.* Garner, C. C. R. 54 J. P. 424; Ros. N. P. 178).

A party's own witness may, by leave of the judge, be similarly contradicted when, in the opinion of the judge (which is not open to review: Rice *v.* Howard, 16 Q. B. D. 681), such witness proves *adverse—i.e.*, hostile [C. L. P. Act, 1854, s. 22; Greenough *v.* Eccles, 5 C. B. N. S. 786; R. *v.* Little, 14 Cox 319; Ros. N. P. 173–174]. A party when called by his opponent is not necessarily adverse, the matter being wholly within the discretion of the Court (Price *v.* Manning, 42 Ch. D. 372).

(2) **Bias or Partiality.**—Facts showing that the witness is biassed or partial in relation to the parties or the cause may be elicited on cross-examination; or, if denied, independently proved (A.-G. *v.* Hitchcock, 1 Ex. R. 91; Ros. N. P. 182; Steph. art. 130; Ros. Cr. Ev. 97; and see Tay. ss. 1440–

1444); *e.g.*, that the witness is the kept-mistress of the party calling her (Thomas *v.* David, 7 C. & P. 350), or that the witness has suborned false witnesses against the opposite party (Queen's case, 2 B. & B. 11; A.-G. *v.* Hitchcock, *supra*), or has had quarrels with, or expressed hostility towards, him (R. *v.* Shaw, 16 Cox 503). So, the fact that the witness has accepted a bribe to testify may, if denied, be proved (A.-G. *v.* Hitchcock, *supra*), though a mere admission by the witness that he has been *offered* a bribe cannot (*ibid.*).

(3) **Previous Conviction.** — A witness may be cross-examined as to whether he has been convicted of any felony or misdemeanour; and if he either denies or does not admit the fact, or refuses to answer, the cross-examining party may prove such conviction (28 & 29 Vict. c. 18, s. 6; although the fact of the conviction is itself wholly irrelevant to the issue: Ward *v.* Sinfield, 49 L. J. C. P. 696; and although the witness is the defendant in a criminal case who has tendered himself as a witness: Law Times, Nov. 5, 1887, p. 2).

(4) **Reputation for Untruthfulness.**—Independent evidence may be given that an adversary's (but not a party's own) witness bears such a general reputation for untruthfulness (or, perhaps, for moral turpitude generally: Tay. s. 1471) that he is unworthy of credit upon his oath. In theory, it seems such evidence should relate to general reputation only, and not express the mere opinion of the impeaching witness; but in practice the question may be shortened thus: "From your knowledge of the witness, would you believe him on his oath?" (R. *v.* Brown, 1 C. C. R. 70).

The impeaching witness cannot, in direct examination, give particular instances of the other's falsehood or dishonesty, since no man is supposed to come prepared to defend all the acts of his life. But, upon cross-examination, he may be asked as to his means of knowledge of the other's witness, his feelings of hostility towards him, or whether, in spite of bad character in other respects, the impeached witness has not preserved his reputation for truth; and the answers to these questions cannot be contradicted (Tay. s. 1471).

The impeaching witness should come from the locality of the other, and not be a stranger sent expressly to learn the latter's reputation (Mawson *v.* Heartsink, 4 Esp. 103).

Matters affecting Credit which are only admissible on Cross-examination.—In addition to the above facts, a witness may, upon cross-examination, be asked any question concerning his antecedents, associations, or mode of life, which, although irrelevant to the issue, would be likely to discredit his testimony or degrade his character, *provided* that "the judge may in all cases disallow any question put in cross-examination of any party or witness which may appear to him to be vexatious or not relevant to any matter proper to be inquired into in the cause or matter" (O. 36, r. 38. *E.g.*, probably questions as to alleged improprieties of remote date, or of such a nature as not seriously to affect present credibility: Tay. s. 1460; Sol. Jour. Jan. 9, 1892).

Thus, on a charge of rape, the prosecutrix may be cross-examined as to her connection with men other than the prisoner (R. *v.* Cockroft, 11 Cox 410; R. *v.* Holmes, 12 Cox 137); and in an action for an indecent assault, the defendant, as to alleged improprieties with other females (Tolman *v.* Johnstone, 2 F. & F. 66); so, in an action for damages for false representation, the defendant was allowed to be asked, as testing his credit, whether a verdict had not been obtained against him for a previous similar representation, although this fact was matter of record (Henman *v.* Lester, 12 C. B. N. S. 776. Where, however, the similar facts do not affect the credit of the witness, they will be excluded as irrelevant: Spenceley *v.* De Willott, 7 East 108; Hollingham *v.* Head, 4 C. B. N. S. 338; Tennant *v.* Hamilton, 7 C. & F. 122; and *ante*, Similar Facts). A witness may also be questioned as to the fact of his bankruptcy, though this, too, is matter of record (Tay. s. 1462; Henman *v.* Lester, *supra*).

On the other hand, witnesses cannot be asked, on cross-examination, to draw inferences of fact discreditable to themselves—*e.g.*, whether a reporter who had attended a meeting went there as a spy (R. *v.* Bernard, 1 F. & F. 240); nor are inquiries as to their religious belief admissible to discredit them (Darby *v.* Ouseley, 1 H. & N. 1); nor questions as to disparaging comments made by the Court on their conduct or testimony in other trials (Seaman *v.* Nethercliffe, 2 C. P. D. 53, *per* Bramwell and Amphlett, J. J. A.); and, where the issue was whether A. had passed off his goods as those of B., B. was not allowed to be asked on cross-examination whether he had advertised the goods in question as

patented without having any patent (Lever *v.* Goodwin, W.N. (C.A.) 1887, p. 107; *sed qu.* as affecting credit). So, a witness cannot, in general, be cross-examined for the purpose of testing his credit as to the *contents of documents* not produced (Macdonnell *v.* Evans, 11 C. B. 930; Darby *v.* Ouseley, 1 H. & N. 1); though the question of the existence of a document or record is separable from that of its contents, and may be inquired into (Henman *v.* Lester, *supra*); and as to previous contradictory statements, see *supra*.

Compulsion to Answer.—Even where a witness may be asked a question relevant only as tending to discredit or disgrace, he is not always compelled to answer. Thus, he may be protected on grounds of *public policy* or *privilege* (*post*, pp. 93 *et seq.*). And the judge has probably a discretion to refuse to compel an answer relevant only in this sense when *the truth of the matter suggested would not, in his opinion, affect the credibility of the witness as to the subject-matter of his testimony* (Steph. 5th ed. art. 129, *note* xlvi.; Tay. ss. 1460, 1461; and see Sol. Jour. Jan. 9, 1892; and *supra*, p. 89).

Contradiction.—Although a witness may be contradicted by independent evidence on all matters relevant to the issue, his credit cannot, except in the cases (1), (2), and (3) mentioned at pp 86–88, be impeached by contradiction on irrelevant matters, and his answers thereon will be conclusive.

Thus, where a witness who professed his inability to speak in any language but Irish, and gave his evidence through an interpreter, had denied, on cross-examination, that he had recently spoken in English to two persons present in court, it was held by a majority of the Irish Court of Criminal Appeal that his answer could not be contradicted by the testimony of these persons (R. *v.* Burke, 8 Cox 44). So, with the denials of a prosecutrix in a case of rape as to her connection with men other than the prisoner (R. *v.* Cockroft, 11 Cox 460; R. *v.* Holmes, 12 Cox 137); and those of a defendant in an action for indecent assault as to improprieties with other females (Tolman *v.* Johnstone, 2 F. & F. 66). And where a witness for a party had denied, on cross-examination, that he had ever expressed his opinion that that party had no case, contradictory evidence was rejected (Elton *v.* Larkins, 5 C. & P. 385, 390).

Re-establishing Credit.—Where a witness's *general repu-*

tation for veracity has been attacked, his character may be sustained either, as we have seen, by cross-examining the impeaching witnesses as to their means of knowledge, grounds of opinion, hostile feelings towards the other, and the like; or by independent general evidence that the impeached witness is worthy of credit (Tay. s. 1473; Steph. art. 133).

It seems doubtful how far independent evidence of the latter description is admissible where merely *particular discrediting facts* have been elicited in cross-examination or proved against a witness. Such evidence has been received in reply to proof of subornation (Annesley *v.* Anglesea, 17 How. St. Tr. 1348; and see Durham *v.* Beaumont, 1 Camp. 207); and previous conviction of crime (R. *v.* Clarke, 2 Stark. 241); but in a later case, where the character of a witness had been impeached on cross-examination, general evidence of this kind, tendered in rebuttal, was rejected (Doe *v.* Harris, 7 C. & P. 330, *per* Coleridge, J. The American decisions are conflicting: Whart. s. 569).

In any case, mere contradiction among witnesses will not let in such evidence (Durham *v.* Beaumont, *supra*); nor, as we have seen, will proof of previous inconsistent statements let in contrary proof of previous consistent ones (*ante*, p. 85), although the inconsistent statements themselves may be disproved (R. *v.* Whelan, 14 Cox 595).

[Tay. ss. 1473–1476; Whart. ss. 569–571.]

Recrimination.—An impeaching witness may, in his turn, be attacked either in cross-examination or by independent general evidence that he is unworthy of credit, but no further recrimination than this is probably allowable. [Tay. s. 1473; R. *v.* Whelan, *supra*.]

CHAPTER XV.

FACTS AFFECTING DOCUMENTS AND OTHER EVIDENCE.

FACTS which affect the genuineness or validity of any material document, or which enable the Court to construe its meaning and terms, or to identify the persons or things to which it relates, are admissible, although extrinsic to the document itself, provided they do not contradict its express terms (see fully, *post*).

So, all preliminary facts and conditions necessary to show the admissibility of other evidence are themselves admissible. Thus, all circumstances which show whether a declaration is part of the *res gestæ*, a confession voluntary, a communication privileged, a dying declaration made without hope of recovery, a witness competent, or a copy of a document receivable, may be proved.

Whether such preliminary facts and conditions have been sufficiently established is a question for the judge; and this is so, although they may themselves be in issue in the case, and ultimately determinable by the jury (Doe *v.* Davies, 10 Q. B. 314; Hitchins *v.* Eardley, L. R. 2 P. & D. 248). It seems doubtful whether the judge, in deciding the question, is confined to strictly legal evidence.

[Tay. ss. 23, 24, 517; Best, s. 82; Powell, 12, 13.]

CHAPTER XVI.

FACTS EXCLUDED BY PUBLIC POLICY.

In one sense, all exclusionary rules of evidence are based on public policy; but the matters which may be said to be more directly excluded on this ground are the following:—(1) Affairs of State; (2) Information given for the detection of crime, (3) Judicial disclosures; and (4) Statements by parents tending to bastardize their offspring.

(1) **AFFAIRS OF STATE.**—Witnesses may not be asked, and will not be allowed, to state facts or to produce documents the disclosure of which would be prejudicial to the public service.

Under this head come the *deliberations of Parliament*—thus, the speeches and votes of members may not be divulged except by leave of the House (Plunkett *v.* Cobbett, 5 Esp. 136; Chubb *v.* Salomons, 3 C. & K. 75); though the mere fact that a member spoke in a given debate, or that a particular person acted as Speaker, may (*ibid.*);—the *proceedings of the Privy Council* when confidential (Layer's case, 16 How. St. Tr. 224; 3 Russ. Cr. 555; 1 Phil. Ev. 182);—*State secrets and papers*—thus, an officer of the Tower may refuse to say whether a plan of that building which is produced is accurate or not (R. *v.* Watson, 2 Stark. 148; see also the Official Secrets Act, 1889, as to penalties for disclosing Government plans, documents, and information);—*Communications between public officials in the discharge of their public duties*—*e.g.*, communications between the governor of a colony and its legal or military officers as to the condition of the colony or the conduct of its agents

(Wyatt *v.* Gore, Holt N. P. 299; Cooke *v.* Maxwell, 2 Stark. 183); communications between the governor of a colony and a Secretary of State (Hennessy *v.* Wright, 21 Q. B. D. 509; Wright *v.* Mills, 62 L. T. 558); reports as to the conduct of an officer by a military court to the commander-in-chief (Home *v.* Bentinck, 2 B. & B. 130; Beatson *v.* Skene, 5 H. & N. 838; Dawkins *v.* Rokeby, L. R. 8 Q. B. 255; Ford *v.* Best, 6 Times Law Rep. 295); reports as to a collision at sea by a naval captain to the Admiralty (H.M.S. Bellerophon, 44 L. J. Adm. 5; and see The Palermo, 9 P. D. 6, as to depositions in a wreck inquiry); reports by the Inspector-General of Prisons to the Lord Lieutenant of Ireland (McElveney *v.* Connellan, 17 Ir. L. R. N. S. 55); correspondence between an officer of Customs and the Board of Commissioners (Anderson *v.* Hamilton, 2 B. & B. 156, *n.*). On the other hand—letters by a private individual to the Postmaster-General, complaining of the conduct of a postal official, are not protected (Blake *v.* Pilfold, 1 M. & Rob. 198); nor are official books, showing the appointment of a collector of property tax, although the clerk producing them is under an oath of office not to divulge official information (Lee *v.* Birrell, 3 Camp. 337); nor communications between the keeper of a lunatic asylum and the Commissioners in Lunacy (Hill *v.* Philp, 7 Exch. 232).

Objections to the disclosure of such matters may be taken on oath by the head of the department; or by a representative who can swear that his chief has considered the matter, and objects to the production; or by the Attorney-General appearing on behalf of the chief, and stating that he is instructed to object; or by the party interested in excluding the evidence; or by the judge himself (Hennessy *v.* Wright, *supra*, and cases cited). Where the head of the department objects, it has been held that the judge has no discretion to compel the production of the evidence (Beatson *v.* Skene, 5 H. & N. 838, *diss.* Martin, B.; but see Hennessy *v.* Wright, *supra*, and Marks *v.* Beyfus, 25 Q. B. D. 494).

The exclusion, when allowed, is absolute, so that in the case of documents no secondary evidence is admissible (Home *v.* Bentinck, *supra*; Dawkins *v.* Rokeby, *supra*; Hennessy *v.* Wright, *supra*).

[Tay. ss. 946–948; Best, s. 578; Ros. N. P. 172, 173; Powell, 146–149; Steph. art. 112; Bray on Discovery, 547–549.]

(2) **INFORMATION FOR THE DETECTION OF CRIME.**—In public prosecutions, informations for fraud committed against the revenue laws, or civil proceedings arising out of either, witnesses may not be asked, and will not be allowed, to disclose the channels through which information has been obtained by the executive, unless the judge considers that such disclosure is necessary to show the innocence of the accused (Marks *v.* Beyfus, 25 Q. B. D. 494).

Scope of Rule.—The rule protects not only the names of the persons by, or to, whom the disclosure was made, but the nature of the information given, and any other question as to the channel of communication or what was done under it (R. *v.* Hardy, 24 How. St. Tr. 808, 816; Marks *v.* Beyfus, *supra*). A constable has, however, been compelled to disclose in whose house he was secreted whilst watching licensed premises kept open after hours (Webb *v.* Cathlove, L. T. vol. xxxii. p. 103; 3 Times L. R. 159).

The protection does not depend upon a claim being made, for it is the duty of the judge apart from objection taken, to exclude the evidence (Marks *v.* Beyfus, *supra;* Hennessy *v.* Wright, 21 Q. B. D. 509, *per* Wills, J.).

The rule does not apply to *private prosecutions*, in which such information must, if material, be disclosed [R. *v.* Richardson, 3 F. & F. 693; Marks *v.* Beyfus, *supra*. Mr. Justice Stephen states that in such cases it is for the judge to decide whether the allowance of the question would, under the particular circumstances, be injurious to the administrations of justice: art. 113].

[Tay. ss. 939–941; Best, s. 578; Ros. Cr. Ev. 154, 155; Steph. art. 113.]

(3) **JUDICIAL DISCLOSURES.**—Judges of the superior courts cannot, probably, be compelled to disclose matters which have arisen before them in their judicial capacity (R. *v.* Gazard, 8 C. & P. 505; R. *v.* Harvey, 8 Cox 99; Buccleuch *v.* Met. B. of Works, L. R. 5 H. L. 418;) though this does

not extend to collateral incidents occurring during a trial—*e.g.*, the attempted rescue of a prisoner in court (R. *v.* E. of Thanet, 27 How. St. Tr. 845. As to the competency of a judge to give evidence in a case tried by himself, see Tay. s. 1379.) So, though a **Barrister** may be asked, he may refuse, to disclose matters stated by him while conducting a case in court (Curry *v.* Walter, 1 Esp. 456). The protection of an **Arbitrator** is somewhat narrower. He may be examined as to the general history of the litigation up to the time of delivering his award; as to what claims were made or admitted; and as to whether he included in his award matters outside the scope of the reference (Buccleuch *v.* Met. B. of Works, *supra*). So, he may be called to prove his own mistake or misconduct (*Re* Whiteley (1891), 1 Ch. 558, 64 L. T. 81). But the inquiry may not extend further; thus he may not be asked the grounds of his award, or what items (provided they are within the scope of the reference) it included, or what were his intentions when giving it; for the award speaks for itself, and any evidence to explain, add to, or contradict it is inadmissible (Buccleuch *v.* Met. B. of Works, *supra*; *Re* Whiteley, *supra*; O'Rourke *v.* Commissioners for Railways, 15 App. Cas. 371).

Neither the testimony, nor the unsworn admissions, of **Petty Jurors** are receivable to impeach their verdict. Thus, an affidavit sworn by all the jurymen was rejected to prove that by mistake they gave a plaintiff less damages than they intended (Jackson *v.* Williamson, 2 T. R. 281); and similar evidence was refused to show that their verdict had been decided by lot (Vasie *v.* Delaval, 1 T. R. 11). So, a compensation juror (unlike an arbitrator) cannot be examined to show that the verdict included compensation for matters outside the scope of the inquiry (Buccleuch *v.* Met. B. of Works, *supra*, *per* Martin, B.). Misconduct connected with the verdict may, however, be proved by the officer in charge of the jury, or by any other actual witness of the transaction; and the evidence of a juryman is receivable upon collateral matters—*e.g.*, to show the circumstances under which he came into the box (Bailey *v.* Macauley, 13 Q. B. 815, 829); so, he may (without leaving the box, or retiring from the case) be examined as to any facts, material to the case, which he knows of his own knowledge (Tay. s. 1379).

The **proceedings of grand jurors** are, according to the better opinion, similarly protected. Thus neither they, nor their clerk, nor the prosecuting officer, may disclose the number or names of the jurors present or the votes given; nor may they explain their finding, or disclose the evidence they heard; or be called to prove that a witness has given testimony in court contrary to what he swore before them (3 Russ. Cr. 552; Tay. s. 943; but as to the last point, see *note* to this sect.). In an action for malicious prosecution, however, a grand juryman has, on two occasions, been permitted to prove that the defendant was the prosecutor (Sykes *v.* Dunbar, 2 Selw. N. P. 1081; Freeman *v.* Arkell, 1 C. & P. 137).

[Tay. ss. 938, 942–945; Best, ss. 579, 580; Steph. art. 111, 114; Whart. ss. 599–603.]

(4) **STATEMENTS BY PARENTS BASTARDIZING THEIR OFFSPRING.**—Where the legitimacy of a child born in wedlock is in question, neither the testimony, nor the declarations out of court, of the parents are admissible to prove their *access* or *non-access* during marriage.

Principle.—The grounds of exclusion seem to be that where the evidence tends to show *access*, it is irrelevant as proving that which the law presumes; and where it tends to show *non-access*, it offends against public morality, decency, and policy (Hubb. Ev. of Succ. 382; Goodright *v.* Moss, Cowp. 594; R. *v.* Kea, 11 East 132).

Scope of the Rule.—The rule excludes not only direct, but collateral inquiries as to access—*e.g.*, whether a father did not, at the time in question, live 100 miles away from his wife and cohabit with her sister (R. *v.* Sourton, 5 A. & E. 180). And it probably applies where the evidence is tendered merely to contradict admissions of paternity by a parent (Ulverstone U. G. *v.* Park, 53 J. P. 629, *per* Huddlestone, B.; such admissions would, however, seem themselves to be inadmissible). So, neither the testimony of a surviving parent (R. *v.* Kea, *supra*), nor the declarations of a deceased one, even on a question of pedigree (R. *v.* Luffe, 8 East 193; Murray *v.* Milner, 12 Ch. D. 849) can be received.

But the rule is confined to direct issues of legitimacy, and to the particular ground of access during marriage. Thus such evidence is admissible in divorce proceedings (32 & 33

Vict. c. 68, s. 3; Guardians of Nottingham *v.* Tomkinson, 4 C. P. D. 343; *Re* Walker, 53 L. T. 660); or to prove that a child was born before, or after, the marriage; or that the marriage itself was valid, or invalid (R. *v.* Bramley, 6 T. R. 330; Standen *v.* Standen, Pea. R. 32; Goodright *v.* Moss, *supra;* Watson *v.* Little, 5 H. & N. 472; Murray *v.* Milner, *supra; Re* Turner, 2 Ch. D. 987); or to prove the paternity of a child born more than nine months after the judicial separation of husband and wife (Hetherington *v.* Hetherington, 12 P. D. 112). Moreover, in affiliation proceedings, after independent proof of non-access, the wife may testify as to who was the father (Legge *v.* Edmonds, 25 L. J. Ch. 125). And statements as to non-access are receivable when tendered not to prove their truth, but as part of adulterous conduct indirectly establishing non-access (Aylesford Peerage case, 11 App. Cas. 1; Burnaby *v.* Baillie, 42 Ch. D. 482; *Re* Walker, 53 L. T. 660).

[Tay. ss. 950, 951; Best, s. 586; Ros. N. P. 1038; Steph. art. 98; Whart. s. 608; Hubb. Ev. of Succ. 382–384.]

CHAPTER XVII.

FACTS EXCLUDED BY PRIVILEGE.

THE matters protected from disclosure on the grounds of privilege are the following:—(1) Professional confidences; (2) Title-deeds; (3) Matrimonial communications; (4) Criminating questions; and (5) Admissions of adultery in divorce cases.

The privilege may be that either of the witness himself, or of another whom he represents; in the former case he will *not be compelled*, and in the latter he will *not be allowed* (without the principal's consent), to disclose the protected matter.

A claim of privilege should, in strictness, be made by the witness himself, and not by counsel (Thomas *v.* Newton, M. & M. 48, *n.*; R. *v.* Adey, 1 M. & Rob. 94; Doe *v.* Egremont, 2 M. & Rob. 386; Boyle *v.* Wiseman, 10 Ex. 647). The judge, however, ought, though he is not bound, to advise the witness of his right (Fisher *v.* Ronalds, 12 C. B. 762; Paxton *v.* Douglas, 16 Ves. 242; A.-G. *v.* Radloff, 10 Ex. 88). The claim may be made at any stage of the examination and is determinable by the judge, who may, if he think fit, hear other witnesses to satisfy himself on the point (Cleave*v.* Jones, 7 Ex. 421). When allowed, it protects the witness from all further answers (R. *v.* Garbett, 1 Den. C. C. 258).

Where a document is privileged the witness cannot be compelled to state its contents, for otherwise the privilege would be illusory (Davies *v.* Waters, 9 M. & W. 608); or his knowledge, information, or belief founded thereon (Lyell *v.* Kennedy, 9 App. Cas. 81). But if the privileged

document, or secondary evidence of it, has been obtained by the opposite party independently, even through the default of the legal adviser, or by illegal means, either will be admissible, for the Court will not inquire into the methods by which the parties have obtained their evidence (Lloyd *v.* Mostyn, 10 M. & W. 481; Cleave *v.* Jones, *supra;* Meath *v.* Winchester, 3 Bing. N. C. 183).

No adverse presumption is to be drawn from the non-waiver of the privilege (Wentworth *v.* Lloyd, 10 H. L. C. 589); except, perhaps, in the case of not answering criminating questions (Tay. s. 1467).

Questions of privilege arise more frequently on applications for discovery or inspection before trial, than with reference to testimony in the witness-box, but the principles are substantially the same (Greenough *v.* Gaskell, 1 M. & K. p. 115, *per* Lord Brougham; Hennessy *v.* Wright, 21 Q. B. D. 509, *per* Wills, J.).

(1) **PROFESSIONAL CONFIDENCES.**—A client (whether party or stranger) cannot be compelled, and a legal adviser (whether barrister, solicitor, or the clerk or intermediate agent of either) will not be allowed, without the express consent of his client, to disclose communications, or to produce documents passing between them in professional confidence.

Principle.—The rule is established for the protection of the client, not of the lawyer; and is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing full and unreserved intercourse between the two (Greenough *v.* Gaskell, 1 M. & K. p. 103; Southwark Co. *v.* Quick, 3 Q. B. D. p. 317; Lyell *v.* Kennedy, 9 App. Cas. p. 86; Wheeler *v.* Le Marchant, 17 Ch. D. pp. 681, 682). The privilege may be waived by the client, therefore, but not by the adviser.

[Tay. ss. 911–913; Best, s. 581; Ros. N. P. 168–171; Ros. Cr. Ev. 143–145; Powell, 125–143; Steph. arts. 115–116; Whart. ss. 576–592; and see Bray on Discovery, and Annual Practice, note to O. 31, r. 1.]

(*a*) **The Retainer.**—Neither a formal retainer, nor the payment of fees, is necessary to constitute the relationship

of solicitor and client; it is enough if the adviser is in any way consulted in his professional character.

And the protection exists notwithstanding a *bonâ fide* mistake in supposing that the solicitor had consented to act (Smith *v.* Fell, 2 Curt. 667); or the latter's subsequent refusal of the retainer (Cromack *v.* Heathcote, 2 Br. & B. 4); or the fact that the solicitor had, unknown to the client, become disqualified (Calley *v.* Richards, 19 Beav. 401).

But no privilege attaches to communications passing *before* the relationship exists, or *after* it has ceased (Greenough *v.* Gaskell, *supra*), or to those made to a lawyer consulted merely as a friend (Smith *v.* Daniell, 44 L. J. Ch. 189). And where a prisoner charged with forgery requested a friend "to ask G. or any other attorney as to his probable punishment," it was held that the relationship had not been established between G. and the prisoner (R. *v.* Brewer, 6 C. & P. 363); so, where a party applied to another, not a solicitor or pretending to be one, to get a conveyance prepared, and the latter wrote to a legal relative, who replied that "the party could not convey," the communication was held not privileged (Doe *v.* Jauncey, 8 C. & P. 99).

(*b*) **Scope of Employment.**—The matter must be within the *ordinary scope of professional employment*, though it need not involve actual or prospective litigation.

The sale, purchase, and conveyance of estates (Carpmael *v.* Powis, 1 Phill. 687), or negotiations for a loan (R. *v.* Farley, 2 C. & K. 313), are within the scope. But not communications to a solicitor acting merely as under-sheriff (Wilson *v.* Rastall, 4 T. R. 753); rent collector (Stratford *v.* Hogan, 2 Ball & B. 164; Doe *v.* Hertford, 19 L. J. Q. B. 526); patent-agent (Mosely *v.* Victoria Co., 55 L. T. 482); or trustee (Tugwell *v.* Hooper, 10 Beav. 348); nor communications in furtherance of a fraud or crime, whether the solicitor is a party to, or ignorant of, the illegal object (R. *v.* Cox, 14 Q. B. D. 153; R. *v.* Downer, 12 Cox 486; *Re* Arnott, 60 L. T. 109; Postlethwaite *v.* Rickman, 35 Ch. D. 722); nor, probably, are forged documents, though entrusted to the solicitor in professional confidence, privileged (R. *v.* Hayward, 2 C. & K. 234; and see R. *v.* Jones, 1 Den. 166; R. *v.* Brown, 9 Cox 281; and R. *v.* Downer, *supra*; Tay. s. 929, cites two earlier cases *contra*).

A correlative test is, whether the nature of the employment would give the Court summary jurisdiction over the solicitor (Turquand *v.* Knight, 2 M. & W. 101).

(*c*) **The Communications must be necessary and confidential.**—The communications must have been *confidentially made for the purpose of the employment*, or the knowledge *confidentially obtained solely in consequence of it*, to be privileged (Gardner *v.* Irvin, 4 Ex. D. 49; O'Shea *v.* Wood (1891), P. 286).

The following matters have been held to be—

Privileged.	*Not privileged.*
Client's Name, Address, Handwriting, &c. A solicitor will not be allowed to disclose his client's address if it has been confidentially communicated to him for the purpose of the employment (*Re* Campbell, 5 Ch. App. 703; *Re* Arnott, 60 L. T. 109).	A solicitor may be compelled to prove his client's name (Bursill *v.* Tanner, 16 Q. B. D. 1); address, if the client is a ward of Court (Ramsbotham *v.* Senior, L. R. 8 Eq. 575), or if it was communicated while engaged in an unlawful act (*Re* Arnott, *supra*), or if not confidentially disclosed (*Re* Campbell, *supra*); handwriting (Dwyer *v.* Collins, 7 Ex. p. 646); identity—*e.g.*, as having sworn an affidavit or put in a pleading (*ibid.*; Studdy *v.* Sanders, 2 D. & R. 347; Greenough *v.* Gaskell, 1 My. & K. 108); the fact of the retainer (Levy *v.* Pope, M. & M. 410; Gillard *v.* Bates, 6 M. & W. 547; Forshaw *v.* Lewis, 1 Jur. N. S. 263); and perhaps its character—*e.g.*, whether personal or representative (Beckwith *v.* Bonner, 6 C. & P. 682); and facts showing the client's mental capacity (Jones *v.* Goodrich, 5 Moo. P. C. 16, 25).
Legal Opinions, Drafts, and Communications. Cases submitted to solicitor or counsel for opinion, and opinions thereon (Reece *v.* Trye, 9 Beav. 316; Penruddock *v.* Hammond, 11 Beav. 59; including the opinion of a foreign lawyer: Bunbury *v.* Bunbury, 2 Beav. 173). Drafts of agreement, leases, or conveyances (Reece *v.* Trye,	Opinion of counsel, effect of which is set out in pleadings (M. of Bristol *v.* Cox, 26 Ch. D. 678; though the mere reference to a privileged document in the pleadings will not destroy the protection: Roberts *v.* Oppenheim, 26 Ch. D. 724). Communications which are *not*

Privileged.

supra; Mostyn *v.* W. M. Co., 34 L. T. 532); draft advertisement settled by counsel (Lowden *v.* Blakey, 23 Q. B. D. 332).

Notes of professional interviews and communications, whether made by solicitor (Ward *v.* Marshall, 3 Times L. R. 578), or client (Woolley *v.* N. L. R., L. R. 4 C. P. 602; M. of Bristol *v.* Cox, 26 Ch. D. 678); or, in the case of a corporation, minutes and reports of a sub-committee in reference to existing or expected litigation (*ibid.*; Worthington *v.* Dublin Ry. Co., 22 L. R. Ir. 310; these two cases are doubted by Mr. Bray in Annual Practice, 1890, p. 540).

Solicitor's bill of costs, whether in his own or the client's possession (Bray, Discovery, 396).

Solicitor's or client's *knowledge derived solely from privileged communications* (Lyell *v.* Kennedy, 9 App. Cas. 81; Proctor *v.* Smiles, 55 L. J. Q. B. 527; see *infra*, as to contents of client's documents).

Client's Documents.

A solicitor will not be allowed to disclose the date when, or purpose for which, his client's documents were entrusted to him (Tur-

Not privileged.

necessary for the purpose of the employment — e.g., a plaintiff's admission to his attorney, after trial, that he had given no consideration for a note sued upon (Cobden *v.* Kendrick, 4 T. R. 431); or a prosecutor's remark that "he would give a large sum to have his adversary hanged" (Annesley *v.* Anglesea, 17 St. Tr. 1223).

Communications to a solicitor respecting *matters of fact, as distinguished from legal advice* (Sawyer *v.* Birchmore, 3 My. & K. 572; Lyell *v.* Kennedy, 9 App. Cas. 84. In Bramwell *v.* Lucas, 2 B. & C. 743, a client's inquiry of his solicitor, "whether he could attend a meeting of creditors without being arrested," was held not priviledged on this ground; but this case, which seems to fall precisely within the protection, has been disapproved).

Solicitor's or client's knowledge derived from *independent sources* (Wheatley *v.* Williams, 1 M. & W. 533; Sawyer *v.* Birchmore, 3 Myl. & K. 572; Manser *v.* Dix, 1 K. & J. 451; see *Re* Holloway, 12 P. D. 167, *infra* 106, as to letters to solicitor or client from strangers with reference to the case); or derived from the employment, but as to mere *facts patent to the senses* (Lyell *v.* Kennedy, *supra;* Brown *v.* Foster, 1 H. & N. 736, in which case a barrister was compelled to disclose that his client's document had been altered during the progress of the trial; *sed qu.* perhaps as to this case; and see Wheatley *v.* Williams, *infra*).

A solicitor may be compelled to disclose the fact that his client executed a given deed, and the circumstances attend-

Privileged.

quand *v.* Knight, 2 M. & W. 98); nor their condition while in his possession—*e.g.*, whether stamped, indorsed, or bearing erasures (Wheatley *v.* Williams, 1 M. & W. 533; though see Brown *v.* Foster, *supra*); nor the circumstances attending their preparation, nor the fact of their subsequent destruction (Robson *v.* Kemp, 5 Esp. 52; Cromack *v.* Heathcote, 2 B. & B. 4; though see Banner *v.* Jackson, and Coleman *v.* Orton, opposite).

"A solicitor cannot be compelled to disclose the contents of documents professionally entrusted to him, and which he is acquainted with only by virtue of professional confidence" (Dwyer *v.* Collins, 7 Ex. 639, *per* Parke, B.)—*e.g.*, from having read them at a conference with counsel (Davies *v.* Waters, 9 M. & W. 608). So, an account-book which had been made out by the client at the solicitor's request for the purpose of submission to counsel is privileged, even in a subsequent action by the solicitor against the client (Cleave *v.* Jones, 7 Ex. 421. And see Doe *v.* James, 2 M. & R. 47; Moore *v.* Tyrrell, 4 B. & Ad. 870).

The above, however, only applies to documents which the client himself would be entitled to withhold (see Bursill *v.* Tanner, opposite).

As to protection of the client's title-deeds, see *post*, p. 110.

Not privileged.

ing the execution, though the deed is thereby impeached (Crawcour *v.* Salter, 18 Ch. D. 30); or that his client put in a pleading or swore an affidavit, for these are matters of publicity (Studdy *v.* Sanders, 2 D. & K. 347; Greenough *v.* Gaskell, 1 M. & K. 108); or the fact that he has in his possession his client's documents, so as to let in secondary evidence if they be not produced on notice (Bevan *v.* Waters, M. & M. 235; Dwyer *v.* Collins, 7 Exch. 639); or perhaps the date when, and person to whom, he parted with them, and when he last saw them (Banner *v.* Jackson, 1 D. G. & S. 472; Coleman *v.* Orton, 9 L. J. Ch. 268).

A solicitor is not allowed to withhold a deed which the other side is, in the ordinary course of things, entitled to see, merely because he has obtained it in the course of litigation (Lyell *v.* Kennedy, 9 App. Cas. 81, *per* Lord Blackburn). Nor is he entitled to withhold production of his client's deeds (other than title-deeds) though entrusted to him in professional confidence, unless the client himself is so entitled (Bursill *v.* Tanner, 16 Q. B. D. 1); nor a document which the client intends others to see as well as the solicitor—*e.g.*, a map of glebe lands entrusted to the solicitor to be shown to intending purchasers. So, generally with documents of a public nature, as appointments of borough officers (R. *v.* Woodley, 1 M. & R. 390; Doe *v.* Hertford, 19 L. J. Q. B. 526); nor documents entrusted to the solicitor for purposes outside the ordinary scope of professional employment—*e.g.*, a book describing tithe lands, and

Privileged.	*Not privileged.*
	given him for the purpose of collecting the tithes (*ibid.*).
Names and Proofs of Witnesses; Pleadings; Copies of pre-existing Documents; Briefs.	
Names of party's witnesses, merely as such (Marriott *v.* Chamberlain, 17 Q. B. D. 154); proofs of witnesses, whether disclosure be sought before (London Gas Co. *v.* Chelsea, 6 C. B. N. S. 411; Fenner *v.* S. E. R., L. R. 7 Q. B. 767), or at the trial (Tichborne case, Times, Feb. 29, 1872, *per* Bovill, C.J.; Campbell *v.* Campbell, Times, Dec. 3, 1886, *per* Butt, J.)	Names of party's witnesses when constituting material facts in the action—*e.g.*, those of persons in whose presence a slander was uttered (Roselle *v.* Buchanan, 16 Q. B. D. 656; Marriott *v.* Chamberlain, *supra*).
Draft pleadings in same or former action (Walsham *v.* Stainton, 2 H. & M. 1; Lamb *v.* Orton, 22 L. J. Ch. 713).	Pleadings (or copies thereof) when filed, for they then become *publici juris* (Walsham *v.* Stainton, *supra*).
Copies or extracts from public, or non-privileged private, documents, if the collection is the result of the solicitor's (or his agent's) labour and skill, and might disclose his view of the client's case (Lyell *v.* Kennedy, 27 Ch. D. 1; Walsham *v.* Stainton, *supra*). Copies of depositions taken before Receiver of Wreck, the copies being obtained by a solicitor for purpose of action and as part of brief (The Palermo, 12 P. D. (C. A.) 6; these depositions seem to have been privileged on official grounds); of examinations in bankruptcy obtained for similar purposes (Gauder *v.* Stansfield, 4 De G. & J. 1; Fenton *v.* Queen's Ferry Co., 38 L. J. Ch. 263; though see Tyas *v.* Brown, 28 W. R. 575, where examinations in lunacy were held not privileged, on the ground, seemingly, of the parties' joint interest).	Public documents—*e.g.*, records and registers, or mere copies thereof (Lyell *v.* Kennedy, *supra*).
	Extracts from private diary kept by party relating to matters subsequently in dispute, the extracts being obtained by the party's solicitor for purpose of action (Land Corporation *v.* Puleston, W. N. 1884, 1; and see Walsham *v.* Stainton, *supra*, where, though extracts from a party's account-books were privileged, the books themselves were not).
	Shorthand writer's notes of evidence and proceedings in open court (Rawstone *v.* Corporation of Preston, 30 Ch. D. 116; Robson *v.* Warwick, 38 Ch. D. 370; not following Norden *v.* Defries, 8 Q. B. D. 508, *contra*).
Indorsements on, or notes and observations in, counsel's brief as to private matters; and solicitor's instructions on, or in, brief	Indorsements on counsel's brief of an order of Court, and any other matters *publici juris* contained therein—*e.g.*, copy pleadings in former action (Nicholls *v.* Jones, 2 H. & M. 588; Lamb *v.* Orton, *supra*).

Privileged.	*Not privileged.*
(Nicholls *v.* Jones, 2 H. & M. 588; Lamb *v.* Orton, *supra;* Walsham *v.* Stainton, *supra;* Haslam *v.* Hall, 3 T. L. R. 776).	
Communications from Co-parties, Opposite parties, Agents, and Strangers.	
Communications between co-plaintiffs or co-defendants, when directed to be submitted to joint solicitor (Jenkins *v.* Bushby, L. R. 2 Eq. 548; though see Hutt *v.* Haileybury Coll., 4 Times L. R. 277).	Communications between co-plaintiffs or co-defendants merely as such (Foakes *v.* Webb, 28 Ch. D. 287; Proctor *v.* Raikes, 3 Times L. R. 229; Hutt *v.* Haileybury Coll., *supra*).
Communications between opposite parties made "without prejudice." [These are excluded, not on grounds of professional privilege, but of public policy—it being essential that men should be protected in their efforts to buy peace (Tay. s. 795; and see *post*, "Admissions without Prejudice," p. 123)].	Communications between opposite parties merely as such (Lyell *v.* Kennedy, 23 Ch. D. 405) —*e.g.*, a notice to produce documents (Spenceley *v.* Schulenburgh, 7 East 357); or an offer to compromise, not made "without prejudice" (Griffith *v.* Davies, 5 B. & Ad. 502).
Oral or documentary information from third persons, which has been *called into existence by the solicitor* (or by his direction, even though obtained by the client) *for the purposes of litigation*—*e.g.*, information to be embodied in proofs of witnesses (*supra*); reports made by medical men at the request of the solicitors of a railway company, as to the condition of a person threatening to sue the company for injury from a collision (Woolley *v.* N. L. R., L. R. 4 C. P. 602; Friend *v.* L. C. & D. R., 2 Ex. D. 437; and see Bustros *v.* White, 1 Q. B. D. 423; McCorquodale *v.* Bell, 1 C. P. D. 471; Wheeler *v.* Le Marchant, 17 Ch. D. 675; Proctor *v.* Smiles, 55 L. J. Q. B. 527); anonymous letters sent to solicitor and counsel with reference to, and for the purposes of, a trial (*Re* Holloway, 12 P. D. 167).	Oral or documentary information from third persons not called into existence by the solicitor, though obtained by him for purposes of litigation—*e.g.*, copies of letters written before action by third persons to the client (Chadwick *v.* Bowman, 16 Q. B. D. 561); or called into existence by the solicitor, though not for the purposes of litigation—*e.g.*, a report made by a surveyor, at the solicitor's request, as to the state of a property upon which the client was about to lend money (Wheeler *v.* Le Marchant, *supra*); or as to matters in respect of which litigation was not at the time contemplated, although it afterwards arose (Westinghouse *v.* M. R. Co., 48 L. T. 462). As to anonymous letters sent to the client, see *infra* p. 107.
Oral or documentary information from third persons, which	Oral or documentary information obtained by the client *other-*

Privileged.	*Not privileged.*
has been *called into existence by the client for the purpose of submission to the solicitor either for advice or for the conduct of litigation* (and whether submitted or not)—*e.g.*, shorthand notes of interviews held between the chairman of a company and an employé, or between a superior and subordinate employé, in order to obtain information on a subject of expected litigation, for submission to the company's solicitors (Southwark *v.* Quick, 3 Q. B. D. 315); reports obtained by a party from his subordinates for a similar purpose (London & Tilbury Ry. Co. *v.* Kirk, 28 Sol. Jour. 688; Haslam *v.* Hall, 3 Times L. R. 776; reports as to the condition of a ship obtained by a party from third persons for purposes of litigation, but not expressed to have been obtained for submission to, or at the request of, his solicitor, were held privileged in Theodor Korner, 3 P. D. 162; *sed qu.*, and see Martin *v.* Butchard opposite, where the contrary was decided.	*wise than for submission to the solicitor—e.g.*, reports made by agent to principal in the ordinary course of business, even though litigation be anticipated (Woolley *v.* North London Ry. Co., L. R. 4 C. P. 602; Cook *v.* North Met. Tram. Co., 6 Times L. R. 22); or an answer to letter from principal stating that certain claims had been made, and asking the agent for information as to the facts (Anderson *v.* Bank of Columbia, 2 Ch. D. 644; London Gas Co. *v.* Chelsea, 6 C. B. N. S. 411; English *v.* Tottie, 1 Q. B. D. 141); or made to the principal to be submitted "in the event of litigation" to the latter's solicitor (Cook *v.* N. M. T. Co.; *supra;* Westinghouse *v.* M. R. Co., 48 L. T. 462); or, perhaps, obtained by principal from agent for purposes of action, but not at request of the former's solicitor, nor for submission to him (Martin *v.* Butchard, 34 L. T. 732; and see Bustros *v.* White, 1 Q. B. D. 423; and Hutt *v.* Haileybury Coll., 4 Times L. R. 277). So, anonymous letters sent by strangers to the client in reference to litigation are not privileged, though *aliter* if sent to the solicitor (*Re* Holloway, *supra*).

(*d*) **Joint Interest or Retainer.**—No privilege attaches to communications between solicitor and client as against persons having a *joint interest* with the client in the subject-matter of the communication—*e.g.*, as between partners (*Re* Pickering, 25 Ch. D. 247; Gourand *v.* Edison, 59 L. T. 813); directors and shareholders (Gourand *v.* Edison, *supra*; Bray, pp. 290–297); trustee and *cestui que trust* (Talbot *v.* Marshfield, 2 Dr. & S. 549; *Re* Mason, 22 Ch. D. 609; *Re* Postlethwaite, 35 Ch. D. 722; even though the party resisting production has paid for the communication: Bacon *v.* Bacon, 34 L. T. 349); lord and tenants of a manor as to customs of manor (Warrick *v.* Queen's Coll., L. R. 3 Eq. 683; Owen *v.* Wynne,

9 Ch. D. 29); lessor and lessee as to production of the lease (Doe *v.* Thomas, 9 B. & C. 288); reversioner and tenant for life as to common title (Doe *v.* Date, 3 Q. B. 609) [see Bray, pp. 378–388]; two persons stating a case for their joint benefit (A.-G. *v.* Berkeley, 2 J. & W. 291); or a husband and wife who are only collusively in contest (Ford *v.* De Pontes, 5 Jur. N. S. 993; *aliter* if the contest is genuine).

Nor does any privilege attach as between joint claimants under the *same client*—*e.g.*, between claimants under a testator as to communications between the latter and his solicitor (Russell *v.* Jackson, 9 Hare 387).

But where the communications relate to matters outside the joint interest, they are privileged even as against a person bearing the expense of the communication—*e.g.*, communications between a plaintiff corporation and its solicitors, as against a defendant ratepayer as to matters not connected with the rates (M. of Bristol *v.* Cox, 26 Ch. D. 678); or between a trustee and his solicitor as against the *cestui que trust* where the communication is not made for the former's guidance in the trust, but to enable him to resist litigation by the latter (Thomas *v.* Sec. of State for India, 18 W. R. 312); or where it concerns his character, not as trustee, but as mortgagee of the client (Johnson *v.* Tucker, 11 Jur. 382).

Where two parties employ the *same solicitor*, the rule is that communications passing between either of them and the legal adviser in his *joint* capacity, must be disclosed in favour of the other—*e.g.*, a proposition made by one to be communicated to the other (Baugh *v.* Cradocke, 1 M. & R. 182; Perry *v.* Smith, 9 M. & W. 681); or instructions given to the solicitor in presence of the other (Shore *v.* Bedford, 5 M. & G. 271; Ross *v.* Gibbs, L. R. 8 Eq. 524); though it is otherwise as to communications made to the solicitor in his *exclusive* capacity [Perry *v.* Smith, *supra*; Tay. s. 926; Bray, 442, 443, 427. The title of either client is generally deemed to fall under the latter head—*e.g.*, where a borrower applies for a loan to the solicitor of the lender, and furnishes him with an abstract of title, the solicitor will not be allowed to prove the abstract as against the borrower (Doe *v.* Watkins, 3 Bing. N. C. 421; Doe *v.* Seaton, 2 A. & E. 171)].

In cases either of joint interest or joint retainer, it is

sufficient, as against third persons, if one only of the interested parties claims the privilege; though all must concur in waiving it (Bray, 427).

(*e*) **Duration of Privilege and Waiver.**—A communication or document "once privileged is always privileged" (Bullock *v.* Corrie, 3 Q. B. D. 356; Pearce *v.* Foster, 15 Q. B. D. 114; though Bowen, L.J., doubts the universal truth of the maxim). Thus, it is not lost in future litigation; on change of solicitors; by the solicitor becoming either personally interested (Chant *v.* Brown, 7 Hare 79), or disqualified (Cholmondeley *v.* Clinton, 19 Ves. 268); or by the death of the client.

It may, however, as we have seen, be waived by the client (though not by the solicitor), either expressly or impliedly—*e.g.*, by the client examining the solicitor as to the privileged matter; though, if only examined as to part, he cannot be cross-examined as to other parts (Vaillant *v.* Dodemead, 2 Atk. 524; Bate *v.* Kinsey, 1 C. M. & R. 38; McDonnell *v.* Conry, Ir. Cir. Rep. 807; R. *v.* Leverson, 11 Cox 152; and see Pye *v.* Butterfield, 5 B. & S., *per* Crampton, J., p.839). Where a corporation elected to answer interrogatories through its town clerk, who was also its solicitor, it was held it had impliedly waived its privilege (M. of Swansea *v.* Quirk, 5 C. P. D. 106); though it was otherwise where it had no option, but was bound to comply with an order to answer through the town clerk (Corp. of Salford *v.* Lever, 42 Q. B. D. 695).

Where the client has parted with the property to which the communication relates, his successor in title may waive the privilege (Bray, 385–387; though this has been held not to apply to a client's trustee in bankruptcy: Bowman *v.* Norton, 5 C. & P. 177; but see Bray, 388). And upon his death the same right passes to his personal representative (Doe *v.* Hertford, 19 L. J. Q. B. 526; Bray, 385–387).

(*f*) **Privilege confined to Legal Advisers.**—Professional privilege is strictly confined to the case of legal advisers; and does not extend to that of *doctors, priests, confidential friends* (Wheeler *v.* Le Marchant, 17 Ch. D. 681), *clerks, stewards*, or *pursuivants of the Heralds' College* employed to oppose enrolment of a pedigree (Slade *v.* Tucker, 14 Ch. D. 824).

A qualified protection, however, is accorded to *bankers*, who are not compellable, in proceedings to which they are

not parties, either to produce or to give secondary evidence of their books, unless by order of a judge for special cause (*post*, p. 249); and to *trade secrets*, the court having a discretion to refuse to compel answers, or inspection of documents, disclosing a secret process of manufacture (Mistovski *v.* Mandleberg, 6 Times L. R. 207; and see Renard *v.* Levenstein, 10 L. T. N. S. 94; and Badische *v.* Levenstein, 24 Ch. D. 156, 169, in which Pearson, J., heard evidence of this kind *in camera*).

(2) **TITLE-DEEDS. LIEN.**—A witness, if a *stranger*, cannot be compelled to produce the title-deeds of his property, or documents in the nature of title-deeds, on account of the mischief which, in the present complicated state of the law of real property, might result if titles to estates were subject to compulsory disclosure (Doe *v.* Date, 3 Q. B. 609; Pickering *v.* Noyes, 1 B. & C. 263; Egremont *v.* Egremont, 14 Ch. D. 158. Mr. Best states the reason to be the mischief which might ensue from an erroneous decision of the judge as to the nature of the documents: s. 128). Nor can a witness, if a *party*, be compelled to produce documents which he swears relate solely to his own title or case, and do not tend to prove or support the case of his adversary (Morris *v.* Edwards, 15 App. Cas. 309; the privilege in the case of a party is not confined to title-deeds: Bewicke *v.* Graham, 7 Q. B. D. 400; Morris *v.* Edwards, 23 Q. B. D. 287; Lyell *v.* Kennedy, 8 App. Cas. 217, *per* Lord Bramwell). Moreover, where a principal would be entitled to refuse production of a document, it cannot be compelled from his *solicitor*, *trustee*, or *mortgagee* (Bursill *v.* Tanner, 16 Q. B. D. 1; Steph. art. 119; Tay. ss. 458, 918); except for the purpose of identification, which must not extend to a perusal of its contents (Volant *v.* Soyer, 13 C. B. 231).

The rule does not apply where the title of the witness would not be affected by the production—*e.g.*, an abstract of title supplied by him in connection with a purchase which subsequently fell through (Doe *v.* Langdon, 12 Q. B. 711; Lee *v.* Merest, 39 L. J. Ex. 53). And the oath of the witness is conclusive as to the nature of the document (Morris *v.* Edwards, *supra;* Ros. N. P. 156).

A witness cannot withhold production of a document on the ground that he has a *lien* upon it; except perhaps

where the lien arises against the party requiring the production (in favour of this exception, Kemp *v.* King, 2 M. & R. 437, recognised in Hope *v.* Liddell, 24 L. J. Ch. 693; *Re* Cameron's, &c., Co., 25 Beav. 4, *per* Romilly, M.R.; Tay. s. 458; Bray, 203–206; *contra*, Fowler *v.* Fowler, 29 W. R. 80; Hunter *v.* Leathley, 10 C. B. 858; Steph. art. 119, *n.*); and not even then in bankruptcy, administration, or winding-up proceedings [Tay. ss. 458, 918, 919, 1464; Ros. N. P. 154–156; Steph. arts. 118, 119].

(3) **MATRIMONIAL COMMUNICATIONS.**—"No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage" (16 & 17 Vict. c. 83, s. 3).

Principle.—The protection has been considered requisite in order to ensure that unlimited confidence between husband and wife upon which the happiness of the married state and the peace of families depend (Tay. s. 909).

Scope of the Rule.—The rule applies equally to parties and strangers; and it probably, in analogy to the old common law rule, extends to all communications made during, or knowledge obtained by means of, the relationship, whether confidential or not; and continues after the marriage has been dissolved by death or divorce (Tay. ss. 909, 910; Ros. N. P. 168).

No protection, however, exists with regard to communications made between the parties *before* marriage, or to facts coming to their knowledge during marriage, but from *extraneous* sources; and the protected evidence will, if voluntarily given, be admissible.

[Best, s. 586; Tay, ss. 909, 910; Ros. N. P. 168.]

(4) **CRIMINATING QUESTIONS.**—No witness (whether party or stranger) is, except in the cases hereafter mentioned, compellable to answer any question or to produce any document, the tendency of which is to expose the witness, or the wife or husband of the witness, to any *criminal charge, penalty, or forfeiture.*

Principle.—The privilege is based on the policy of

encouraging persons to come forward with evidence in courts of justice, by protecting them, as far as possible, from injury, or needless annoyance, in consequence of so doing (Best, s. 126). A sensible compromise has, however, been adopted in several modern statutes by compelling the disclosure, but indemnifying the witness from its results (see *infra*).

[Tay. ss. 1453–1468; Best, ss. 126–129; Ros. N. P. 166–168; Powell, 116–123; Steph. art. 120; Bray on Discovery, 311–349; Whart. ss. 533–540].

(*a*) **Scope of the Rule.**—The witness is protected from answering as to crimes, penalties, and forfeitures cognizable not only by English but foreign law, provided the foreign law be clearly proved or admitted, for if there is no evidence on the subject, an answer may be compelled (U.S. *v.* McRae, L. R. 3 Ch. App. 79; King of Two Sicilies *v.* Willcox, 1 Sim. N. S. 301). And the rule applies to questions not only as to direct criminal acts, but as to perfectly innocent matters forming links in the chain of proof (see *infra*).

No privilege exists, however, as to answers tending merely to establish a debt, or to subject to civil actions not in respect of a penalty or forfeiture (46 Geo. III. c. 37)—*e.g.*, those involving liquidated damages as distinguished from penalty (Adams *v.* Batley, 18 Q. B. D. 625); or a determination of estate by conditional limitation as distinguished from forfeiture (Bray, 334–336); or as to the contents of public documents (Bradshaw *v.* Murphy, 7 C. & P. 612).

(*b*) **Oath of the Witness not conclusive.**—The mere declaration on oath that the answer would or might tend to criminate the witness, is not necessarily sufficient; for the Court is entitled to see, from the circumstances of the case and the nature of the evidence the witness is called to give, that there is reasonable ground to apprehend danger from his being compelled to answer; although, if such danger is once made apparent, great latitude should be allowed to the witness in judging for himself of the effect of any particular question (R. *v.* Boyes, 1 B. & S. 311; followed and approved in *Re* Reynolds, 20 Ch. D. 294; Lamb *v.* Munster, 10 Q. B. D. 110; and *Re* Genese, 3 Morrell's Bky. Rep. (C. A.) 223).

Where the question calls for direct admission of a *corpus*

delicti, or an act reasonably construable as such, the oath of the witness that the answer would or might tend to criminate him, will generally be accepted without more—*e.g.*, in an action for publishing an indictable libel where the defendant is asked whether he published the libel (Lamb *v.* Munster, *supra*; though *aliter* if the libel is not indictable: McLoughlin *v.* Dwyer, Ir. R. 9 C. L. 170); so, as to whether the defendant had not raised a weir to the height of eighteen inches across a salmon river, as such an act might not unreasonably be construed to amount to a criminal obstruction under 5 & 6 Vict. c. 106, s. 63 (Bradley *v.* Clayton, 26 L. R. Ir. 405); and similarly a defendant in ejectment may decline to answer as to sub-letting without licence, or non-insurance against fire (Bray, 337). But even here, if there is no reasonable probability of proceedings being taken, an answer will be compelled—*e.g.*, where the witness was technically liable to an impeachment by the House of Commons, although he had already been pardoned at law (R. *v.* Boyes, *supra*).

Where the question relates to a perfectly *innocent act*, involving danger only as a link in the chain of proof, the witness must, before the privilege will be allowed, satisfy the Court, by facts outside the question, that the answer would or might tend to criminate him (*Re* Genese, *supra*).

(*c*) **Claim must be bonâ fide.**—The Court must also be satisfied that the claim is made genuinely for the protection of the witness, and not for ulterior purposes (*Re* Reynolds, *supra*, where a witness declined to answer whether he had, as trustee, executed a post-nuptial settlement made by a bankrupt, on the ground that he might be charged with conspiracy to defeat the latter's creditors, and the Court disallowed the claim, considering it a mere device to stifle inquiry).

(*d*) **The privilege ceases with the liability.**—If the time for proceeding has expired (Roberts *v.* Allatt, M. & M. 192; A.-G. *v.* Cunard, 4 Times L. R. 177); or the penalty or forfeiture has been waived; or the offence has been pardoned (R. *v.* Boyes, *supra*); or the witness has already been convicted or acquitted (*Re* Genese, *supra*); the privilege will cease.

EXCEPTIONS—(*a*) **By Statute.**—Under the *Bankruptcy Act*, 1883, debtors cannot refuse to answer questions touching their conduct, dealings, or property on the ground of crimination; and their answers are evidence against them in subsequent criminal proceedings (s. 17, sub-ss. 1 and 8; *Re* A Solicitor, 25 Q. B. D. 17; so, under former Bankruptcy Acts: *Re* Frith, 6 Ch. D. 230; R. *v.* Hillam, 12 Cox 174). But this does not apply to other witnesses in a bankruptcy (*Re* Genese, 3 Morrell 223; *Re* Frith, *supra*).

By s. 29 of the *Larceny Act*, 1861, a witness cannot refuse to answer questions put to him in any civil or bankruptcy proceeding on the ground that they might expose him to a charge of stealing, destroying, or concealing title-deeds or wills, under ss. 28, 29; and, by s. 85, he cannot refuse to answer on the ground of exposure to a charge of embezzlement, as a banker, merchant, broker, attorney, agent, or factor, under ss. 75–84; *provided* that no person shall be liable to be convicted of any of the felonies mentioned in the former sections, or any of the misdemeanours mentioned in the latter sections, by any evidence whatever in respect of any act done by him, if he shall, at any time previously to being so charged, have first disclosed such act on oath in consequence of any compulsory process in any *civil* or *bankruptcy* proceeding. (See ss. 29 and 85. The word "disclosed" in these sections refers exclusively to that which was not before known: R. *v.* Skeen, 8 Cox 143; and mere hearsay or rumour that the alleged offence had been committed is not admissible to prove that it was before known: R. *v.* Gunnell, 16 Cox 154.) The Bankruptcy Act, 1890, s. 27, sub-s. 1, repeals so much of s. 85 of the Larceny Act, 1861, as relieves a witness, compulsorily examined in *bankruptcy*, from liability to conviction for the misdemeanours mentioned in ss. 75–84; and substitutes the following narrower protection,—"A statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in respect of any of the misdemeanours referred to in the said sections." [Bankruptcy Act, 1890, s. 27, sub-s. 2.]

Under the *Gaming Acts*, 8 & 9 Vict. c. 109, s. 9; 17 & 18 Vict. c. 38, ss. 5 and 6; the *Merchandise Marks Act*, 1862,

s. 11; the *Corrupt and Illegal Practices Prosecution Act*, 1883, s. 59; the *Explosives Act*, 1883, s. 6, and several other statutes, witnesses may also be compelled to answer criminating questions, subject to various degrees of statutory protection from the consequences of their admissions.

(*b*) **By Contract and Conduct.**—Witnesses have also in a few cases been held disentitled to the privilege of refusing to answer in respect of penalties or forfeiture, but not of crime, by their own contract or conduct (Bray, 336–340).

(5) **ADMISSIONS OF ADULTERY IN DIVORCE CASES.**—In proceedings instituted in consequence of adultery, the parties and their husbands and wives are competent witnesses, provided that no witness in any proceedings, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he, or she, has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery (32 & 33 Vict. c. 68, s. 3).

Scope of the Rule.—It has been held that the above section refers to proceedings instituted in consequence of adultery in the Divorce Court, and not to bastardy cases (Guardians of Nottingham *v.* Tomkinson, 4 C. P. D. 343; *Re* Walker, 53 L. T. 660; Burnaby *v.* Baillie, 42 Ch. D. 282); also, that the proviso is to be confined to any *such* proceeding, and does not extend to a nullity suit (M. *v.* D. 10 P. D. 175, *per* Hannen, J., adopting Steph. art. 109, *n.*). In Redfern *v.* Redfern, 1891, P. 139, however, the C. A. considered, though the point was not necessary to the decision, and the above case was not cited, that no witness in any proceeding, could be asked as to his or her adultery, on account of the risk of ecclesiastical censure [*sed qu.*]. In R. *v.* Boyes, 1 B. & S. 311, mere liability to obsolete proceedings, was held insufficient; and in R. *v.* Orton, cited Steph. art. 129, a witness was compelled to answer as to his adultery. The view that the protection is confined to divorce proceedings was also adopted in s. 3 of the Evidence Bill, 1891.

The rule protects from liability to be asked or compulsion to answer questions in the witness-box, whether in chief or

on cross-examination; and whether put directly to prove the issue or collaterally to impeach credit (Hebblethwaite *v.* Hebblethwaite, L. R. 2 P. & D. 29; Babbage *v.* Babbage, *id.* 222); as well as from discovery by affidavit or interrogatories (Redfern *v.* Redfern, *supra;* and see Smith *v.* Smith, Times, Oct. 28, 1890, where Butt, J., rejected an admission of adultery which had already been made without objection in answer to interrogatories by a respondent who did not appear). So, an admission as to one act will not let in questions as to others (Bell *v.* Bell, L. T. vol. lxxxvi. 448).

Where the witness has denied the alleged adultery the questions are admissible; so where he had denied *some* of the acts alleged in the petition, but had not been asked as to others,—it was held he might be cross-examined as to all that were included in the pleadings (Brown *v.* Brown, L. R. 3 P & D. 198).

And, if the witness be willing to give evidence the testimony will be received (Hebblethwaite *v.* Hebblethwaite, *supra;* Long *v.* Long, 12 P. D. 218).

CHAPTER XVIII.

HEARSAY.

ORAL or written statements made by persons not called as witnesses are not receivable to prove the truth of the matters stated, except in the cases hereinafter mentioned.

Original Evidence and Hearsay distinguished.—Statements by non-witnesses may be either original evidence—*i.e.*, where the making of the statement, and not its accuracy, is the material point; or hearsay (derivative or second-hand) evidence—*i.e.*, where the statement is offered as proof of its own truth; the test of whether a statement belongs to one class or the other being the purpose for which it is tendered.

Under the former head may be classed the various declarations hitherto treated of—viz., (1) statements which are part of the *res gestæ*, whether actually *constituting* a fact in issue, as a libel or contract; or *accompanying and explaining one*, as the cry of the mob during a riot, or expressions of mental or bodily feeling; (2) statements amounting to acts of ownership, as leases, licences, and grants; and (3) statements which corroborate or contradict the testimony of witnesses. To these may be added conversations admitted to enable a witness to fix a date (R. *v.* Richardson, 1 Cox 361; in the Tichborne case depositions in a former trial were not allowed to be read for this purpose: vol. i. 193); and inquiries and answers tendered to the judge to show reasonable search for a lost document or an absent person (R. *v.* Braintree, 1 E. & E. 51; Wyatt *v.* Bateman, 7 C. & P. 586). In some cases what is called a verbal fact may be admissible as original evidence, although the

particulars of it may be excluded as hearsay—*e.g.*, the fact that a person made a communication to another, in consequence of which an act was done (R. *v.* Williams, 4 Cox 92; R. *v.* Wainwright, 13 Cox 171), or consulted him on a given subject (Shilling *v.* Accidental Death Co., 4 Jur. N. S. 244), or complained of an injury (*ante*, p. 51); or had a dispute prior to the publication of a libel (Steph. art. 9, illus. *a*).

The term "hearsay," though usually confined to statements by non-witnesses used to prove the truth of the facts declared, is by some writers applied indiscriminately to *all* statements by unexamined persons for whatever purpose tendered—a definition which, it has been remarked, can only save the maxim "Hearsay is no evidence" from the charge of falsehood by exceptions which make nonsense of it (Steph. Dig. *note* viii.). It is also sometimes said that "*acts* may be as completely hearsay as *statements*," the illustration given being that if A. by his conduct treat B. as sane, it is equivalent to A.'s making an oral assertion to that effect. But A.'s assertion is here really excluded, not because it is hearsay (for it would be equally inadmissible, except from an expert, if delivered on oath), but because it is opinion evidence upon a subject on which such evidence is not receivable. That assertion by conduct is not convertible, as regards admissibility, with assertion by statement, is shown in that class of cases in which acting in a capacity or relationship is admissible in a party's own favour, while his mere declaration that he was entitled to so act would not be (*ante*, pp. 49–51). It seems safer, therefore, to confine the term "hearsay" to statements, merely, leaving the question of the admissibility of acts to be considered under the head of relevancy.

Principle of Exclusion.—The grounds commonly assigned for the rejection of hearsay evidence are—(1) the irresponsibility of the original declarant; (2) the depreciation of truth in the process of repetition; (3) the opportunities for fraud its admission would open; to which may be added the tendency of such evidence to protract legal inquiries, and to encourage the substitution of weaker for stronger proofs.

Mr. Justice Stephen considers hearsay evidence as excluded on grounds of irrelevancy, a view which involves the adoption of a twofold standard of relevancy—relevancy

to the issue (art. 2), and relevancy to the truth of the matter stated (art. 14). It has been objected that this view ignores the circumstance that though a statement is a fact, it is one of a peculiar nature, being itself the statement of a fact, and that the relevancy of such fact is governed by the same rules, whether it be stated on oath or not. Such statement, then, being one which, if made by a witness, would be perfectly relevant, is when not so made excluded, because it is wanting in the sanction and the tests which apply to sworn testimony, and admitted only when, in respect of the persons making it, or of the circumstances under which it was made, there is some security for its accuracy, which countervails the absence of those safeguards. The doubt and suspicion attending it are a doubt and suspicion attaching to its *accuracy*, and are wholly distinct from the reasons which exclude facts as not tending to prove the matters in issue, and are based upon *inference*. The rule of exclusion, then, being a different rule, founded on different reasons, and subject to exceptions which are related to the reason of that rule and not to the reason of the rules as to relevancy, it is only by an arbitrary use of the word "relevant" that the two classes of evidence can be included in the same category (An English Evidence Code, Sol. Jour. Sept. 30, 1876). It would also seem to follow that, if statements by non-witnesses are excluded as irrelevant, statements by witnesses should be admitted as relevant facts; whereas they are treated by the author of the Digest not under the head of relevancy, but of proof (art. 61).

Scope of the Rule.—The rule against hearsay excludes, in general, all statements, oral or written, the probative force of which depends either *wholly or in part* on the credit of an unexamined person, notwithstanding that such statements may possess an independent evidentiary value derived from the circumstances under which they were made (Prof. Thayer, Ir. Law Times, Feb. 19, 1881; Chamberlayne's Best, *note* to p. 492); and notwithstanding that no better evidence of the facts stated is to be obtained.

[Tay. ss. 567–606; Best, ss. 492–495; Powell, 151–163; Steph. art. 14, and *note* viii.; Whart. ss. 170–176.]

EXAMPLES.

In an action between A. and B. to prove that C., a debtor, was abroad at a certain time, a statement that he was so, made by C.'s servant in answer to inquiries at his house, is inadmissible (Robinson *v.* Markis, 2 M. & R. 375; *aliter* as original evidence of an unsuccessful search for C.: Wyatt *v.* Bateman, 7 C. & P. 586).

To prove that A. ordered certain goods from the plaintiff, evidence that a man came with a cart having A.'s name painted on it, and took the goods away, saying A. had ordered them, is inadmissible (Everest *v.* Wood, 1 C. & P. 75; *aliter* if the man was proved to be A.'s agent).

In an action for rent by A. against B., to which the defence is that B. had paid the rent to C. as his landlord, A., in order to prove that C. received the rent merely as his agent, tenders C.'s accounts rendered to him acknowledging the receipt of the rent as such agent; the accounts are inadmissible (Spargo *v.* Brown, 9 B. & C. 935; C.'s written receipt of the rent would also be inadmissible as evidence of its payment for B. against A., unless C. were first proved to be A.'s agent).

In an action against A. for goods sold, to which A. pleads infancy, an affidavit by A.'s father (deceased) stating the date of A.'s birth, and made in a former action to which the plaintiff was not a party, is inadmissible to prove A.'s age (Haines *v.* Guthrie, 13 Q. B. D. 818. Such an affidavit would have been admissible had the question been one of *pedigree*).

A., a post-office official, is charged with secreting a letter containing a bill of exchange. The letter states that the bill is enclosed. The contents of the letter, though they may be read against A. as having been found in his possession, are not admissible to prove that the bill was enclosed (R. *v.* Plumer, R. & R. 264).

The question being whether a certain deed was forged;—a statement made by an attesting witness (deceased) that it was forged, is inadmissible (Stobart *v.* Dryden, 1 M. & W. 615).

The question being whether A. murdered B.;—a death-bed confession made by C. that he, and not A., had committed the murder, is inadmissible (Gray's Case, Ir. Cir. Rep. 76).

CHAPTER XIX.

EXCEPTIONS TO THE HEARSAY RULE. ADMISSIONS.

THE rule excluding hearsay is subject to several important exceptions, which have been established not logically, and as a result of the development of any particular principle, but simply as a matter of history and precedent.

These exceptions may be reduced to three classes :— (A) Admissions; statements made in the presence of a party; and confessions; (B) Statements made by persons since deceased; and (C) Statements contained in public documents.

To which it may be added that in affidavits used in interlocutory proceedings, deponents are allowed to speak not only to facts within their own knowledge, but to their information and belief (O. 38, r. 3).

Hearsay, when falling within the above exceptions, is admissible although direct evidence of the facts stated is obtainable.

ADMISSIONS.

Statements made by a party to the proceedings, or by a person connected with him in any of the ways mentioned in Chap. XX. are admissible *against*, but *not in favour of*, such party, in proof of the facts stated.[a]

An admission in the legal is not always an admission in the popular sense—*i.e.*, a statement which, at the time it was made, was against the real or apparent interest of the party.

In law, *any* declaration by a party to the proceedings is, in general, evidence for his adversary of the truth of its contents. Admissions may, of course, also be receivable against a party as original evidence—*e.g.*, when amounting to a contract or representation (Ros. N. P. 67).

Principle.—The ground of reception is, that a party's declaration may be presumed to be true as against himself. No presumption of truth, however, arises with regard to the declarations of a party or his agents when tendered as evidence in his own favour; and the latter, therefore, though they may often be admissible for him as original evidence, are excluded for probative purposes, subject to a partial exception in the case of taking accounts, the judge having power to direct that the books in which the accounts in question have been kept shall be taken as *primâ facie* evidence of their truth, the parties interested being at liberty to take such objections thereto as they may be advised (O. 33, r. 3).

[Tay. ss. 723–861; Best, ss. 510–531; Ros. N. P. 62–79; Powell, 239–294; Steph. arts. 15–20; Whart. ss. 1075–1135.]

(i.) **When and to whom Admissions may be made.**[b]—When a party sues, or is sued, *personally*, any admission made by him on a former occasion, even while a minor (O'Neill *v.* Read, 7 Ir. L. R. 434); or sustaining a representative character (Beasley *v.* McGrath, 2 Sch. & Lef. 34; Stanton *v.* Percival, 5 H. L. C. 257), may be given in evidence against him; but when sued or suing as a *representative*, he cannot affect his principal by his admission made before sustaining, or after he has ceased to sustain, that character (*post*, Chap. XX.).

It is, in general, immaterial *to whom* the admission was made (Best, s. 528). Thus, an admission made to a stranger is as receivable as one made to an opponent, though it is said that an admission, in order to support an account stated, must have been made to the creditor or his agent (Tay. s. 799; Mr. Best considers this to refer merely to weight, and not to admissibility: s. 528). Even an admission made in confidence to a legal adviser or a wife is receivable if proved by a third person (*ante*, Privilege). So, private memoranda never communicated to the opposite side or to third persons are evidence against a party (Bruce

v. Garden, 17 W. R. 990; Whart. s. 1123); as are admissions made to himself in mere soliloquy (R. *v.* Simons, 6 C. & P. 540).

(ii.) **Circumstances of the Admission.**[e]—As the weight of an admission depends on the circumstances under which it was made, these circumstances may always be proved to impeach or enhance its credibility. Thus, the admission (unless amounting to an estoppel) may be shown by the party against whom it is tendered to be untrue; or to have been made under a mistake of law or fact; or to have been uttered in ignorance, levity, or an abnormal condition of mind. On the other hand, the weight of the admission increases with the knowledge and deliberation of the speaker, or the solemnity of the occasion on which it was made [Tay. ss. 854–861; Best, ss. 529, 530; Ros. N. P. 64; Whart. ss. 1078–1080].

Admissions without Prejudice. — Offers of compromise made expressly or impliedly "without prejudice" cannot be given in evidence against a party as admissions; the law, on grounds of public policy, protecting negotiations *bonâ fide* entered into for the settlement of disputes [Tay. ss. 774, 795–797; Ros. N. P. 62, 63; Powell, 288, 289; Steph. art. 20; Whart. s. 1090]. And a letter marked "without prejudice" protects subsequent (Paddock *v.* Forrester, 3 M. & G. 903; *Re* Harris, 44 L. J. Bky. 33), and even previous (Peacock *v.* Harper, 26 W. R. 109), letters in the same correspondence. Moreover, it is now settled that such letters cannot, without the consent of both parties, be read on a question of costs to show willingness to settle; although the mere fact and date of such letters or negotiations, as distinguished from their contents, may sometimes be received to explain delay (Walker *v.* Wilsher, 23 Q. B. D. 335).

Such letters, however, are only protected if *bonâ fide* written with a view to a compromise (Grace *v.* Brynton, 21 Sol. Jour. 631). Thus, a letter "without prejudice" which contains a threat against the recipient if the offer be not accepted, is admissible to prove such threat (*ibid.*; Kurtz *v.* Spence, 58 L. T. 438). So, independent facts admitted during negotiations for a settlement are receivable (Waldridge *v.* Kennison, 1 Esp. 143); as are offers without prejudice, if the offer has been accepted (*Re* River Steamer Co., L. R. 6 Ch. 822; Walker *v.* Wilsher, *supra*; *Re* Leite,

L. T. vol. lxxii. 971); or the protected condition fulfilled (Holdsworth *v.* Dimsdale, 19 W. R. 798).

Compulsion.—Admissions obtained under compulsion are evidence against a party if the compulsion was legal (*e.g.*, an answer to interrogatories), but not if it was illegal (Tay. ss. 798, 799; Ros. N. P. 63).

(iii.) **Whole Statement must be taken.—Hearsay and Opinion.**[d]—When an admission is tendered against a party, he is entitled to prove so much of the whole statement, document, or correspondence containing, or referred to in, the admission, as is necessary to explain the admission, and although such other parts may be favourable to himself; but the jury may attach different degrees of credit to the different parts. *Distinct* matters, however, though relevant to the case, cannot be so introduced (Tay. ss. 725–736, 738; Ros. N. P. 79, 179, 180; Steph. *note* ix.).

An admission is receivable, although its weight may be slight, which is founded on *hearsay* (*Re* Perton, 53 L. T. 706); or consists merely of the declarant's *opinion or belief* (Doe *v.* Steel, 3 Camp. 115); but where the admission is an inference from facts not personally known to the declarant, the Court may disregard the inference and look to the facts (Bulley *v.* Bulley, L. R. 9 Ch. 739); and a bare statement that a party "is informed," without the addition of his belief in the information, will not amount to an admission (1 Daniel's Ch. Pr. 6th ed. 575; Tay. s. 737; Trimblestown *v.* Kemmis, 9 C. & F. 780; Roe *v.* Ferrars, 2 B. & P. 548).

As to statements by an agent containing hearsay or opinions, see The Actæon, 1 Spinks E. & A. 176; The Solway, 10 P. D. 137, cited *post*, p. 144.

(iv.) **Matters provable by Admission.**—Admissions are receivable to prove matters of *law*, or mixed law and fact, though (unless amounting to estoppels) these are generally of little weight, being necessarily founded on mere opinion. Thus, a defendant's admission that his trade was a nuisance has been received (R. *v.* Neville 1 Peake 91); so a prisoner's admission of a former valid marriage is some, though not sufficient, evidence to support a conviction for bigamy (R. *v.* Savage, 13 Cox 178). In R. *v.* Philp, 1 Moo. C. C. 263, however, a prisoner's admission of the prosecutor's *title* to property was altogether rejected.

Matters of fact, simply, may always be proved in this manner. Thus, a wife's admission of adultery, though uncorroborated, has on more than one occasion been held sufficient evidence, where considered trustworthy, upon which to grant a divorce (Robinson *v.* Robinson, 1 S. & T. 362; Williams *v.* Williams, L. R. 1 P. & D. 29), though if corroboration is available it must be produced (White *v.* White, 62 L. T. 663).

Admissions, being primary evidence against a party, are receivable to prove the *contents of documents*, without notice to produce, or accounting for the absence of, the originals (Slatterie *v.* Pooley, 6 M. & W. 664; Boulter *v.* Peplow, 9 C. B. 493), and although the oral testimony of the party to the same effect would be inadmissible (Darby *v.* Ouseley, 1 H. & N. 1; Tay. s. 409; though see Farrow *v.* Blomfield, 1 F. & F. 653, *per* Pollock, C.B., and Henman *v* Lester, 12 C. B. N. S. 776).

And this rule, it seems, applies to the contents of *records* as well as other documents (Murray *v.* Gregory, 5 Ex. 468; the case of Scott *v.* Clare, 3 Camp. 236, *contra*, decided before Slatterie *v.* Pooley, *supra*, would probably not now be followed: Ros. N. P. 64). Such admissions ought, however, in many cases to have no weight—*e.g.*, where the party tendering them is himself withholding more satisfactory evidence, or where the admission assumes a degree of knowledge which the declarant is not likely to possess, as of the construction of a deed (Ros. N. P. 63). It seems, also, that the judge may direct the documeut itself to be produced (Farrow *v.* Blomfield, *supra;* Boulter *v.* Peplow, *supra*).

The *execution* of documents to the validity of which attestation is not necessary, may also be so proved (the C. L. Procedure Act, 1854, s. 26; Tay. ss. 414, 1843); and even in some cases the execution of those to which attestation is necessary (Tay. ss. 1848–1850).

Admissions may even, as we have seen, sometimes be received as to matters protected by *privilege*, provided they are proved by third persons (*ante*, Privilege).

(v.) **Form of the Admission.**—The form of the admission is, in general, immaterial; so far, at least, as its admissibility is concerned. Thus, admissions are receivable which are contained in—*Affidavits* or *answers to interrogatories* in the same (O. 31, r. 24) or former proceedings; *recitals and*

descriptions in deeds (the former of which are generally conclusive between the parties in an action on the deed, but only *primâ facie* evidence against them in other cases (Carpenter *v.* Buller, 8 M. & W. 212; Tay. ss. 96–98, 858; Ros. N. P. 76; Powell, 249–252); *receipts* (whether on separate papers, or indorsed on deeds or negotiable securities); *accounts rendered;* bankers' *pass-books; maps and surveys* (see *post*, p. 232); *cases for the opinion of counsel* (Meath *v.* Winchester, 3 Bing. N. C. 183); sworn (but not old unsworn) *inventories and declarations by executors*, which operate as an admission of assets (Tay. s. 860; so also affidavit stamps: *id.*). Even an *invalid instrument* may operate as an admission as to collateral matters (Whart. s. 1124; but not, now, an *unstamped* one, except in criminal cases: Stamp Act, 1891, s. 14). The inclusion or omission of a debt in a *bankrupt's statement* is evidence of the existence or non-existence of the debt as against himself, though it may not be against his trustee or creditors (*post*, p. 146; Hart *v.* Newman, 3 Camp. 13; Nicholls *v.* Downes, 1 M. & R. 13, in which such an omission was held conclusive).

A *judgment* is not an admission by the parties of the facts decided of which a stranger can take advantage; though a solemn confession on which a judgment has been rendered may be (*post*, Judgments), nor are *pleadings* filled in former proceedings, unless sworn or otherwise clearly adopted by the party himself, for they are deemed merely to be the suggestions of counsel, and are frequently contradictory (*post*, p. 143).

As to admissions by *conduct* or *silence*, see *ante*, p. 52; and *post*, p. 147.

EXAMPLES.

Admissible.

(*a*) A. sues B. for the price of goods sold;—an entry in A.'s shop-books debiting C. and not B. with the goods, is evidence *against* A. to disprove the debt (Storr *v.* Scott, 6 C. & P. 241).

(*b*) A., when defending a suit as guardian for B. a minor, makes an affidavit of certain facts. This affidavit is evidence against A. of the facts sworn to,

Inadmissible.

(*a*) A. sues B. for the price of goods sold;—an entry in A.'s shop-books, debiting B. with the goods, is not evidence for A. to prove the debt (Smith *v.* Anderson, 7 C. B. 21).

(*b*) A. makes an admission of certain facts. Afterwards A. is appointed executor of B. In an action brought by him as such executor, his previous ad-

Admissible.	*Inadmissible.*
in a subsequent action against him personally (Beasley *v.* Magrath, 2 Sch. & Lef. 34).	mission is not receivable (Legge *v.* Edmonds, 25 L. J. Ch. 125).
A. with the consent of B., his debtor, insures the latter's life for a sum exceeding the amount of the debt, and pays B.'s premiums. In a private memorandum, never shown to B., A. debits B. with the premiums so paid. On B.'s death these entries are receivable against A. as admissions that B.'s representative, and not A., is entitled to the surplus of the policy-moneys (Bruce *v.* Garden, 17 W. R. 990).	
(*c*) A. sues B. on a bill of exchange, and during confidential negotiations for a settlement, admits the signature of the bill to be his. This is receivable against B., though the rest of the negotiations are not (Walridge *v.* Kennison, 1 Ex. 143).	(*c*) A. sues B. on a bill of exchange. B., in a letter "without prejudice," offers to pay the debt without costs. A. refuses the offer. B.'s letter is not receivable against him as an admission of liability (*Practice*).
(*d*) A. sues B. on a bill of exchange, of which B. had received no notice of dishonour. B. writes, "without prejudice," that he will waive the omission to give notice if A. will accept the debt without costs. A. accepts the offer, but B. makes default in payment. In a fresh action B.'s admission is receivable (Holdsworth *v.* Dimsdale, 19 W. R. 798).	
(*d*) A., a solicitor, sues B. on a bill of costs. B. pleads a set-off for goods sold, and tenders a debtor and creditor account furnished by A., in which A. debited himself with the amount of the goods, but credited himself with his costs. The account is evidence for B. of the debit items, and for A. of the credit items, although no signed bill thereof had been delivered (Harrison *v.* Turner, 10 Q. B. 482; Randle *v.* Blackburn, 5 Taunt.	(*d*) A. sues B. for moneys collected by him as A.'s agent. B. pleads a set-off for payments made on A.'s account. Entries of receipts made by B. in his account-book are evidence for A.; but entries of payments distinct from, and unconnected with, the receipts, are not evidence for B. (see Reeve *v.* Whitmore, 2 D. & S. 446, 450; *aliter* if a receipt and payment are mixed up in the same transaction, so that the one is merely

Admissible.	*Inadmissible.*
245; Thompson *v.* Austen, 2 D. & Ry. 361).	a deduction from the other: *id.*; see *post*, p. 169).
The question being whether A. was an infant at the time of making a certain contract;—an admission by A. that he was so, is receivable against him, although necessarily founded on hearsay (R. *v.* Walker, 1 Cox 99; R. *v.* Symonds, 4 Cox 277. So, as to an admission of illegitimacy: *Re* Perton, 53 L. T. 706).	The question being whether A. gave or lent money to B., and an admission by B. that he had been repeatedly insolvent being proved against him;—a statement made by B. on the same occasion as the admission, that A. had given him the money, held not admissible for B. in explanation of the admission being upon a distinct matter (Prince *v.* Samo, 7 A. & E. 627).

CHAPTER XX.

PERSONS WHOSE ADMISSIONS MAY BE EVIDENCE AGAINST A PARTY.

A PARTY to the proceedings may be affected by the admissions of those standing in the following relationships to him:—

(A) Nominal and real parties.
(B) Predecessors in title.
(C) Partners, joint-contractors, and associates.
(D) Agents and referees.
(E) Miscellaneous cases.

Admissions made by such persons may (unless amounting to estoppels) be contradicted or explained in the same way as those made by the party himself. The admissions of a party, however, are, as we have seen, generally receivable against himself *whenever* made, while those of others can only affect him when made during the *continuance of, and with reference to, the particular character or interest* entitling them to be proved.

(A) **NOMINAL AND REAL PARTIES.**—A nominal party may be affected by the admissions of a real party, who, though not named on the record, has a *substantial interest* in the result [Tay. ss. 756, 757; Ros. N. P. 67; Steph. art. 16].

The admissions must have been made while the real party was actually interested; and, further, they are only receivable so far as his own interests, or the interests of those who claim through him, are concerned [Tay. s. 757].

Thus, the admissions of a *cestui que trust* are evidence against his trustee, so far as their interests are identical (Hanson *v.* Parker, 1 Wils. 257; Harrison *v.* Vallance,

1 Bing. 45; Doe *v.* Wainwright, 8 A. & E. 691; May *v.* Taylor, 6 M. & G. 261); those of a shipowner against the master, in an action by the latter for freight (Smith *v.* Lyon, 3 Camp. 465); those of the persons interested in a policy, against the party in whose name the policy was effected (Bell *v.* Ansley, 16 East 143); those of the indemnifying creditor against the sheriff (Dowden *v.* Fowle, 4 Camp. 38; Proctor *v.* Lainson, 7 C. & P. 629); those of ratepayers against either the churchwardens and overseers in a settlement appeal (R. *v.* Hardwick, 11 East 579; R. *v.* Whitley, 1 M. & S. 636); or a township on a question as to the non-repair of a bridge (R. *v.* Adderbury, 5 Q. B. 187).

But not those of devisee or heir, against executor or administrator (Osgood *v.* Manhattan Co., 3 Cow. 62; Dillard *v.* Dillard, 2 Strobh. 89); unless the latter are the mere representatives of the former (Kegan *v.* Grim, 13 Penn. St. 508).

Conversely, the admissions of a representative, if made while sustaining that character (Legge *v.* Edmonds, 25 L. J. Ch. 125; Fenwick *v.* Thornton, M. & M. 51; Metters *v.* Brown, 32 L. J. Ex. 140), and touching his principal's interest (Fox *v.* Waters, 12 A. & E. 43; Stanton *v.* Percival, 5 H. L. C. 257), are in general receivable against the principal; and this is so although the representative is a mere nominal party, or bare trustee, whose name is used only for purposes of form [Moriarty *v.* L. C. and D. Co., L. R. 5 Q. B. 314; Steph. art. 16; Ros. N. P. 67; Tay. s. 755 (though see s. 741); Whart. ss. 1207–1213].

But the admissions of a *guardian* or *next friend* of an infant are not receivable against the latter, for, though named on the record, they are merely officers of the Court, appointed for the infant's protection; so, also, perhaps with *committees* of lunatics (Stanton *v.* Percival, *supra*). Nor are those of an executor receivable against the heir or devisee (Putnam *v.* Bates, 3 Russ. 188; Fordham *v.* Wallis, 10 Hare 217; at least where the two characters are distinct: *id.*).

As to the admissions of co-representatives *inter se*, see *post*, Partners and Joint-Contractors, pp. 134, 137.

(B) **PREDECESSORS IN TITLE.**—Statements made by persons in possession of property, and qualifying or affecting their title thereto, are receivable against a party claiming through them by title subsequent to the admission.(a)

The cases in this and the following article are usually included under the head of "**Privity**," a term which denotes successive or mutual relationship to the same rights of property. Privies are of three classes: (1) privies in *blood*, as heir and ancestor, or co-parceners; (2) privies in *law*, as executor to testator, or administrator to intestate (sometimes called privies in representation); husbands suing or defending in right of their wives; lords by escheat; tenants by the curtesy, or in dower; (3) privies in *estate or interest*, as donor and donee, lessor and lessee, joint-tenants, successive bishops, rectors, and vicars.

Principle.—The grounds upon which admissions are evidence against those in privity with the party making them is, that they are *identified in interest.*

[Tay. ss. 90, 758, 787–794; Whart. ss. 1156–1169.]

(i.) **The rule is only co-extensive with the identity of interest.**[b]—Thus, admissions by the holder of a subordinate title are not receivable to affect the estate of his superior, which he has no right to alienate or encumber—*e.g.*, those of an occupier, his landlord's title; or those of a tenant for life, the title of the remainderman or reversioner (Scholes *v.* Chadwick, 2 M. & Rob. 507; R. *v.* Bliss, 7 A. & E. 550; Papendick *v.* Bridgewater, 5 E. & B. 166; Howe *v.* Malkin, 40 L. T. 196, 27 W. R. 340; a similar qualification obtains with regard to declarations made by deceased persons against their proprietary interest: *post*, p. 168).

The receipts of a lessee of vicarial tithes have, however, been held evidence of a *modus* against the vicar (Jones *v.* Carrington, 1 C. & P. 329; Illingworth *v.* Leigh, 3 Gwill. 1615); and in an action to recover land, the admission of a tenant in possession will, from the peculiar nature of the proceedings, be received against one who defends as landlord (Doe *v.* Litherland, 4 A. & E. 784; see R. S. C. 1883, O. 12, rr. 25 and 26; Tay. s. 789). So, the admissions of a tenant in tail are often receivable against the remainderman, because the former is regarded as representing the inheritance (Tay. s. 758).

A distinction must also be taken between the case of an assignee of land or other property, and that of an ordinary assignee of a *negotiable instrument*, the former having in general no title in law or equity unless his assignor had, while the latter may have a good title though his assignor

had none. Accordingly, unless the plaintiff on a bill or note stands on the title of the former holder (*e.g.*, by taking the bill overdue, or without consideration), the declarations of such holder are not evidence against him (Byles on Bills, 14th ed. p. 437; Tay. ss. 790, 791).

(ii.) **The declarations must qualify or affect the title.**—The declarations to be admissible must qualify or affect the predecessor's title, and not relate to independent matters (Coole *v.* Braham, 3 Ex. 183, 18 L. J. Ex. 105; Ivat *v.* Finch, 1 Taunt. 141; Whart. ss. 1168, 1169).[c]

(iii.) **And be made during the continuance of the interest.**—The declarations must also have been made while the predecessor was in possession of the property, and not after he had parted with his interest (Tay. s. 794).[d]

EXAMPLES.

Admissible.

(*a*) A. sues B. to recover a watch, which B. claims to retain as administrator of C., deceased; —a declaration by C., that he had given the watch to A., is evidence against B. (Smith *v.* Smith, 3 Bing. N. C. 29; and see Ivat *v.* Finch, 1 Taunt. 141).

A. as lessee of B., the lord of a manor, claims toll on all tin raised from a certain mine, his title thereto depending on the mine being situated under the waste of the manor;—a statement in an old lease, granted by a former lord of the manor, of the surface of adjoining lands, that the land over the mine was private property, and not waste of the manor, is evidence to negative A.'s claim (Crease *v.* Barrett, 1 C. M. & R. 919. And see Doe *v.* Seaton, 2 A. & E. 171).

A. claims the advowson of a certain church, against B., the bishop of the diocese;—a case submitted by a former bishop to counsel, touching the right of presentation, and giving copies

Inadmissible.

(*b*) The question being whether A. had a right of common over a certain field belonging to B.;—a statement by C., B.'s tenant of the field, that A. had the right, is not receivable against B., though it would be against C., or those claiming through him (see Papendick *v.* Bridgewater, 5 E. & B. 166; Scholes *v.* Chadwick, 2 M. & Rob. 507; R. *v.* Bliss, 7 A. & E. 550).

(*c*) In an interpleader issue between a bill of sale holder and an execution creditor, as to the right to a debtor's chattels, an admission by the debtor of a debt due to the bill of sale holder, held, not evidence against the creditor, as it did not affect the title to the chattels (Coole *v.* Braham, 3 Ex. 183; although it was said the creditor might be considered as claiming under the debtor).

(*d*) In an action by A., as mortgagee of B., to set aside a prior conveyance of the same property by B. to C., as being voluntary and void;—an admis-

Admissible.	*Inadmissible.*
of entries in the parish books relating thereto, is evidence against B. (Meath *v.* Winchester, 3 Bing. N. C. 183; Carr *v.* Mostyn, 5 Ex. 69).	sion by B. that A. had advanced money on the mortgage is not evidence against C., being made after B. had parted with his interest (Doe *v.* Webber, 1 A. & E. 733; Lalor *v.* Lalor, 4 L. R. I. 678). So, an admission by a former party to a bill of exchange, after he had negotiated it, is not evidence against the holder (Pocock *v.* Billing, 2 Bing. 269).

(C) **PARTNERS, JOINT-CONTRACTORS, AND ASSOCIATES.**—An admission, or representation, made by any partner concerning the partnership affairs and in the ordinary course of its business, is evidence against the firm (Partnership Act, 1890, s. 15);[a] and an admission by one of several joint-contractors, concerning the joint-contract, is evidence against the rest, whether sued or suing jointly or severally.

Principle.—The identity of interest rendering such evidence receivable arises from the principle that persons seised jointly are seised of the whole, and, being seised of the whole, the admission of each is deemed the admission of the other (*Re* Whiteley (1891), 1 Ch. 558).

[Tay. ss. 598–601, 743–754, 787; Ros. N. P. 71; Steph. art. 17; Lindley, Partnership, pp. 128, 162–166; Supplement, p. 40; Pollock, The Partnership Act, 1890, p. 90; Whart. ss. 1192–1206. As to admissions by partners *inter se*, see *post*, p. 137.]

(i.) **There must be a joint, and not merely a common, interest.**—Thus, the admissions of joint-tenants and co-partners are receivable against the others; but not those of tenants in common; or of co-part-owners of a ship, as distinguished from co-partners therein (Jaggers *v.* Binnings, 1 Stark. 64; Brodie *v.* Howard, 17 C. B. 109). And in America, the admissions of co-distributees, or co-devisees, have been rejected against the rest (Whart. s. 1199); as also those of the several underwriters of a policy (Lambert *v.* Smith, 1 Cranch C. C. 361), or of successive indorsees of a promissory note, though it is otherwise as to joint indorsees (Russell *v.* Doyle, 15 Me. 112; Howard *v.* Cobb, 3 Day 309; Whart. s. 1199, *a*). And the same has been held as to

admissions by the several members of a board of public officers (Lockwood *v.* Smith, 5 Day 309).

Co-representatives.—An admission of the receipt of money by one of several trustees who are not personally liable is not receivable against the others (Davies *v.* Ridge, 3 Esp. 101; and see Charlton *v.* Durham, L. R. 4 Ch. 433, and Richardson *v.* Younge, L. R. 6 Ch. 478), though *aliter* if all are liable (Scaife *v.* Johnson, 3 B. & C. 421), or as to a notice given to one of several trustees (*Re* Wyatt, Sol. Jour. July 18, 1891; Godefroi on Trusts, 677). And it seems doubtful if the admissions of an executor, though made in his representative character, will bind his co-executors (Tullock *v.* Dunn, Ry. & M. 416; approved by Parke, B., in Scholes *v.* Watson, 12 M. & W. 514; though see Fox *v.* Waters, 12 A. & E. 43, and Charlton *v.* Durham, *supra*). The admissions of an executor are not receivable against an administrator appointed during the absence of the executor (Rush *v.* Peacock, 2 M. & Rob. 162; Robinson's case, 5 Rep. 32 b), nor against an administrator *de bonis non* (Pease *v.* Phelps, 10 Conn. 62).

Co-defendants.—The admissions of co-defendants, merely as such, are not receivable against each other, for there is no issue joined between them, and no opportunity for cross-examination; besides which, the plaintiff might, by joining a friend as defendant, gain an unfair advantage (Tay. s. 754); nor are admissions between co-defendants under O. 32, r. 2, evidence against a plaintiff who is no party to them (Dodds *v.* Tuke, 25 Ch. D. 617). Similarly, the admissions of a respondent are not receivable against a co-respondent (Robinson *v.* Robinson, 1 S. & T. 363); nor, *à fortiori*, against the petitioner (Plummer *v.* Plummer, 4 S. & T. 257). Nor are those of parties engaged in a joint-tort, or joint-crime, receivable against each other, except to the limited extent noticed, *ante*, p. 42.

Principal and Surety.—Declarations by a principal made during the transaction of the business for which the surety is bound, so as to become part of the *res gestæ*, are evidence against the surety; but his mere admissions, subsequently made, are not (Tay. ss. 785, 786; Steph. art. 17; Whart. s. 1212; as to the effect of Statutes of Limitation, see *infra*).

Thus, in an action against a surety upon a bond con-

ditioned for the faithful conduct of a collector, one of the terms of the bond requiring the latter to keep proper books of account; entries made by him in such books in the ordinary course of duty were admitted against the surety, upon the grounds that the books were part of the *res gestæ*, and that the nature and effect of the contract made them evidence (Guardians of Abbeyleix *v.* Sutcliffe, 26 L. R. Ir. 332, *per* Gibson and Holmes, JJ., *diss.* O'Brien, J.); but confessions of embezzlement made by the collector after his dismissal were rejected (Smith *v.* Whittingham, 6 C. & P. 78); so, where A. guaranteed such goods as B. should send to C. in the way of trade, the admissions of C. that he had received goods, made after the time of their supposed delivery, are not evidence against A. (Evans *v.* Beattie, 5 Esp. 26; Bacon *v.* Chesney, 1 Stark. 192). Nor, in the absence of special agreement, is a judgment or award against the principal admissible against the surety (*Ex parte* Young, *Re* Kitchin, 17 Ch. D. 668; *post*, Judgments).

In America, however, the admissions of the surety have been held evidence against both (Chapel *v.* Washburn, 17 Ind. 393).

(ii.) **The admissions must have been made during the continuance of the joint interest.**[b]—Thus, an admission made by a partner *before* the partnership, is not evidence against his co-partner (Tinsley *v.* Evans, 2 Dowl. & L. 747; Catt *v.* Howard, 3 Stark. 3); nor, generally, is an admission made *after* the dissolution (Tay. s. 599); unless the joint liability continues, in which case the joint interest is deemed to continue also (*id.*; Pritchard *v.* Draper, 1 R. & My. 191). So, bankruptcy (*Re* Wolmerhausen, 38 W. R. 537; Bankruptcy Act, 1883, s. 113), or death, will sever the joint interest; consequently, in the latter case, the admissions of the survivors will not bind the estate of the deceased (Atkins *v.* Tredgold, 2 B. & C. 23); nor, conversely, will those of his representatives bind the survivors (Slater *v.* Lawson, 1 B. & Ad. 396).

(iii.) **The joint interest must be proved independently.**[c]—The admissions or representations of a partner or joint-contractor are not, except as against himself, receivable to prove the existence of the partnership or joint-interest (*ante*, p. 41; Tay. s. 753); nor, probably, the nature or extent of the partnership business (Lindley, Partnership, 166);

nor, the extent of his own authority to bind the firm (*Ex parte* Agace, 2 Cox Eq. 312); and, in an action against partners, the answer to interrogatories of one partner cannot be read against the others, unless they have had an opportunity of contradicting it (Parker *v.* Morrell, 2 Phill. 450; Dale *v.* Hamilton, 5 Hare 393).

(iv.) **Fraud.**—Admissions made by one partner in fraud of the firm are receivable against the latter (Rapp *v.* Latham, 2 B. & Ald. 795); Moore *v.* Knight (1891), 1 Ch. 547; unless made collusively with the other side (Tay. s. 749).

(v.) **Statutes of Limitation.**—Where actions on simple contracts have become barred by the Statute of Limitations, no joint-contractor, or his personal representative, shall lose the benefit of the statute by reason only of any written *acknowledgment* or *promise* signed by any other joint-contractor or his representative (9 Geo. IV. c. 14, s. 1); or by the duly authorized agent of either (19 & 20 Vict. c. 97, s. 13). Nor shall any co-contractor or co-debtor (or his personal representative), whether bound jointly, or jointly and severally (or severally only: *Re* Wolmerhausen, 38 W. R. 537), lose the benefit of the statute by reason only of any *payment* of any principal, interest, or other money, by any other co-contractor, &c. (19 & 20 Vict. c. 97, s. 14); even though such payment is made with the knowledge and consent of the co-debtors (Jackson *v.* Woolley, 27 L. J. Q. B. 181).

It seems doubtful how far the above enactments apply to acknowledgments or part payments by *partners*. Mr. Taylor (ss. 600, 601) maintains that such acknowledgments, &c., will not prejudice the other partners. Lord Justice Lindley, however, remarks (Partnership, p. 263) that, "an acknowledgment by an agent being now sufficient to affect his principal, an acknowledgment by one partner will, it is apprehended, be regarded as an acknowledgment by the firm; and, notwithstanding s. 14, a part payment by a partner will probably be regarded as a part payment by the firm;" and see to same effect, Goodwin *v.* Parton, 42 L. T. N. S. 568, and Watson *v.* Woodman, L. R. 20 Eq. 721, 730.

Where a *principal and surety* make a joint and several promissory note, part payments by the former will not deprive the latter of the benefit of the statute (Cocksill *v.* Sparkes, 1 H. & C. 699). But it is otherwise where the

surety's debt arises upon a separate guarantee (*Re* Powers, 30 Ch. D. 291). And the statute does not apply to mortgages of land; so that payments made by either principal or surety will keep alive the mortgage debt as against the other (*Re* Frisby, 43 Ch. D. 106). As to acknowledgments of a mortgagor's title by one of several mortgagees in possession, see the Real Property Limitation Act, 1874, s. 7; Richardson *v.* Younge, L. R. 6 Ch. 471; and a series of articles on Statutes of Limitation as affecting Mortgagees, in Sol. Jour. June 28 to July 18, 1891.

(vi.) **Admissions by partners, &c., inter se.**—Though admissions by partners bind the firm when tendered by *strangers*, they do not necessarily have this effect when tendered *inter se*. Thus, it has been held that, as between themselves, entries in the partnership books made without the knowledge of a partner will, as against him, be inadmissible (Hutchinson *v.* Smith, 5 Ir. Eq. 117; Stewart's case, 1 Ch. App. p. 587; Lindley, Partnership, p. 536; and *post*, Access to Documents, p. 150). And a similar rule holds as to directors of a company, *inter se* (*ante*, p. 42); and the members of a corporation (*post*, Access to Documents).

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) In an action by A. & B., as partners, to recover goods alleged to belong to the partnership,—an admission by A. that the goods were his sole property, is evidence to defeat the joint-claim (Lucas *v.* Delacour, 1 M. & S. 249; so, as to admissions by one of several makers of a joint and several promissory note: Whitcomb *v.* Whitting, 2 Doug. 652).	(*a*) A. & B., as partners, are sued for a joint trespass;—an admission by either that they had committed the trespass is not evidence against the other, as it does not relate to a partnership matter (see Fox *v.* Waters, 12 A. & E. 43, *per* Williams, J.).
(*b*) A. & B. sue C. for a debt due to them when in partnership;—an admission made by A. after the dissolution, that C. had after the dissolution paid the debt, is evidence against both to prove the payment (Pritchard *v.* Draper, 1 R. & My. 191).	(*c*) A. & B., as partners, are sued upon a bill of exchange signed in the name of the firm by A., and given in payment of a private debt of A.'s;—an admission by A. that he had B.'s authority to accept the bill is not evidence against B. (*Ex parte* Agace, 2 Cox Eq. 312).

(D) **AGENTS AND REFEREES.**—The admissions of an agent are receivable against his principal (1) when the agent is expressly authorized to make them; (2) when the agent is authorized to represent the principal in any business, and the admissions are made in the ordinary course of, and with reference to, such business.

[Tay. ss. 602–605; Ros. N. P. 69–71; Powell, 277–285; Steph. art. 17; Whart. ss. 1170–1190.]

[As to the acts, contracts, and representations of the agent which are original evidence, and receivable for, as well as against, his principal, see *ante*, p. 40.]

Past Transactions.—It is sometimes said that the declarations of an agent are not receivable as to past transactions. This is misleading; and has probably arisen from the common saying that the declarations of the agent must constitute a part of the *res gestæ*. But it has been pointed out that the Latin phrase is here used merely as a compact expression for "the business," regarding which the law identifies the principal and agent, and must not be taken to import that the declarations must form a part of the *res gestæ* in the evidentiary sense of that term; for, so long as they are made concerning the principal's business and in the ordinary course of it, it is immaterial whether they relate to past or present events (Prof. Thayer, Irish Law Times, Feb. 19, 1881). Of course, if the transaction or business in which the agent is employed is at an end, his subsequent admissions regarding it will be rejected; as will his admissions regarding matters which are not properly within the scope of the employment.

Reports to Principal.—An agent's reports to his principal are not, in general, receivable against the latter as admissions (*Re* Devala Co., 22 Ch. D. 593; Cooper *v.* Met. B. of W., 25 Ch. D. 472; Langhorn *v.* Allnutt, 4 Taunt. 511; Kahl *v.* Jensen, *ibid.* 565; Rayner *v.* Pearson, *ibid.* 662; Betham *v.* Benson, Gow. 45; Fairlie *v.* Hastings, 10 Ves. 123; though see *contra*, The Solway, 10 P. D. 137; *post*, p. 144).

If, however, the principal has *replied* to the agent, the letters of the latter will be admissible as explanatory of the statements of the former (Coates *v.* Bambridge, 5 Bing. 58).

The following are some of the chief cases in which principals may be affected by the admissions of their agents:—

Corporations and their Officers.—The *directors* of a com-

pany may make admissions on its behalf when acting for it in the course of a transaction with a third person; but their confidential reports to a meeting of the shareholders (*Re* Devala Co., *supra;* Meux' Exors.' case, 2 D. M. & G. 522); or their admissions at a board meeting of less than the requisite number of members (Ridley *v.* Plymouth Banking Co., 2 Ex. 711), are not so receivable. The *manager* of a banking company may make admissions against the bank as to its practice in making loans to customers (Simmons *v.* London, &c., Bank, 62 L. T. 427). The *surveyor* of a corporation who has the superintendence of its buildings may make admissions as to the pulling down of the buildings (Peyton *v.* St. Thomas' Hospital, 3 M. & Ry. 625, *n.*); but his report to the corporation as to the value of lands about to be purchased by it is not evidence, either of the truth of the facts stated, or to explain the resolutions or letters of the corporation as to the purchase (Cooper *v.* Met. B. of W. 25 Ch. D. 472). The admissions of a *waywarden* that a certain road is a highway, and that the parish is liable to repair it, are evidence against a highway board (Loughboro' H. B. *v.* Curzon, 55 L. T. 50). A *station-master* may make admissions against a railway company as to property lost at his station when subsequently, in the course of his duty, giving information to the police as to such loss (Kirstall *v.* Furness Ry., L. R. 9 Q. B. 468; admissions made by a *night-inspector* as to property lost when in his charge have, however, been rejected, though made in answer to inquiries by the owner: Gt. W. Ry. *v.* Willis, 18 C. B. N. S. 748, *sed qu.*; and the admissions of a *coachman* as to the loss of a parcel entrusted to him were received against the coach proprietor in Mayhew *v.* Nelson, 6 C. & P. 58; see also Stiles *v.* Cardiff S. N. Co., 33 L. J. Q. B. 310; and for similar American decisions, Whart. s. 1182).

On the other hand, the *secretary* of a company cannot (unless acting under the express orders of the directors) make admissions against the company, even as to the receipt of a letter (Bruff *v.* G. N. R., 1 F. & F. 345; Burnside *v.* Dayrell, 3 Ex. 225; and see *ante*, p. 45). So, in an action against a company for injury by a dog, admissions as to its ferocious character made by *servants* of the company who had known the dog, are not receivable against the company, though *aliter* if made by the manager of the

business at the place, or by the person who had charge of the yard or even of the dog (Stiles *v.* Cardiff S. N. Co., *supra;* and see Agassiz *v.* London Tram. Co., 27 L. T. 492, where the admissions of a tram conductor as to the driver's negligence were rejected as against the company; *ante*, p. 34).

Contractor and Workman.—In an action against a contractor for injury sustained by his workman through the fall of a bucket, an admission by a fellow-workman that the latter had not hooked the bucket securely because he was in a hurry, is not evidence against the contractor (Johnson *v.* Lindsey, 53 J. P. 599).

Trader and Shopman.—The admissions of a shopman are evidence against his master as to matters within the ordinary course of business (*e.g.*, the receipt of shop goods), but not as to a transaction outside the usual business (Garth *v.* Howard, 8 Bing. 451, where the admission of a pawnbroker's assistant as to a loan made on *special* terms was rejected; Schumack *v.* Lock, 10 B. Moo. 39; and see Clifford *v.* Burton, 1 Bing. 199, and Meredith *v.* Footner, 11 M. & W. 202).

Landlord and Agent.—The admissions of a land-agent or rent-collector, though evidence to prove the receipt of rent, are not receivable as to his landlord's title in the absence of proof of his agency *ad hoc* (Ley *v.* Peter, 3 H. & N. 101).

Consignor and Consignee.—*Quære* whether, when goods are consigned by a manufacturer to an agent in England for shipment and sale in a distant country, it may not be taken as an implied term of the agreement by the consignor, that the account sales rendered by the agent's foreign correspondent shall be good *primâ facie* evidence of the amount realised by the sale (Smith *v.* Blakey, L. R. 2 Q. B. 326).

Husband and Wife.—A wife, merely as such, cannot affect her husband by her admissions; though he may, of course, constitute her his agent for that purpose either expressly or impliedly. Thus, where a husband allowed his wife to conduct the business of his shop in his absence, her admissions in the ordinary course of such business—*e.g.*, as to the receipt of shop goods, or an offer to pay for them—are evidence against him; though not her admissions outside the scope of such business—*e.g.*, the amount of the shop

rent, or the other terms of the tenancy (Clifford *v.* Burton, *supra;* Meredith *v.* Footner, *supra*). So, where the business is such as is usually transacted by women, a wife's admission will be received against her husband—*e.g.*, an admission that she had agreed to pay 4*s.* a week for the nursing of her child (Anon., 1 Stra. 527; as to contracts for household necessaries, see Lush, Husband and Wife, pp. 293 *et seq.*, 349; and see, generally, Tay. ss. 766–771; Ros. N. P. 72; Powell, 283–285; Whart. ss. 1214–1220).

Client and Solicitor.—A solicitor has, in civil cases, implied authority to make admissions against his client during the actual progress of litigation, either for the purpose of dispensing with proof at the trial, in which case they are generally conclusive (*ante*, p. 6); or incidentally as to any of the facts of the case, when they amount only to *primâ facie* evidence. Such admissions may be made in court, or in chambers, or by documents or correspondence connected with proceedings. Thus, an undertaking signed by their solicitor to appear for A. and B. "as joint-owners of the sloop in question," is evidence of such joint-ownership (Marshall *v.* Cliff, 4 Camp. 133; Wagstaff *v.* Watson, 4 B. & Ad. 339); so in an action on a bill, a notice, served by the defendant's solicitor to produce "all documents relating to the bill which was accepted by the said defendant," is *primâ facie* evidence of the acceptance. As to statements by solicitors in judicial proceedings, see Haller *v.* Worman, 3 L. T. N. S. 741; *infra*. But admissions made by a party's solicitor *before* litigation has commenced (Wagstaff *v.* Watson, 4 B. & Ad. 339; Ley *v.* Peter, 3 H. & N. 101, 111, *per* Watson, B.); or during litigation, but in *mere conversation* (Petch *v.* Lyon, 9 Q. B. 147; Tay. s. 782), are not evidence against their clients. So, although a solicitor's admission on the trial of an action is evidence against his client, on a new trial of the same action, even though retracted by the solicitor before the new trial (Elton *v.* Larkins, 1 M. & Rob. 196; Doe *v.* Bird, 7 C. & P. 6), yet it seems an admission by him made in one action cannot be used against the client in another action (Blackstone *v.* Wilson, 27 L. J. Ex. 229, *per* Martin, B., and Pollock, C.B.; and see Doe *v.* Ross, 7 M. & W. 102, 122).

When a solicitor is already constituted in the cause, admissions made by his *managing clerk* or *agent* are received

as his own, not only against the client (Taylor *v.* Willans, 2 B. & Ad. 845; Tay. 782), but against the solicitor in favour of the client (Ashford *v.* Price, 3 Stark. 185).

In criminal cases, as we have seen (*ante*, p. 7), admissions for the purpose of dispensing with proof are not generally receivable; nor has a solicitor implied authority, as in civil cases, to affect his client by admissions of fact incidentally made. In order to make a party responsible for his solicitor's letters they must be shown to have been written in pursuance of express instructions from the client, and not merely in consequence of interviews had with him (R. *v.* Downer, 14 Cox 486; 43 L. T. 445).

Admissions by *counsel* stand upon a narrower footing, for while the attorney represents the client throughout the cause, the former represents him only upon the particular occasion for which he is briefed (Richardson *v.* Peto, 1 M. & G. 896). Subject to this, such admissions are, in civil cases, conclusive if made for the purpose of dispensing with proof at the trial (Urquhart *v.* Butterfield, 37 Ch. D. 357; Harvey *v.* Croydon Union, 26 Ch. D. 249), but are otherwise merely *primâ facie* evidence against the client. Thus, a special case signed by counsel on both sides is evidence of the facts stated on a new trial (Van Wart *v.* Wooley, Ry. & M. 4); so, statements made for the purpose of influencing a judge's decision in chambers, whether made by counsel, solicitor, or the latter's clerk, are evidence against the client on the trial of the action (Haller *v.* Worman, 2 F. & F. 165; affirmed, 3 L. T. N. S. 741): and where a case is so conducted by counsel as to lead to the inference that a certain fact is admitted by him, the Court or jury may treat it as proved (Stracy *v.* Blake, 1 M. & W. 168; Doe *v.* Roe, 1 E. & B. 279), not only for the particular issue, but for all purposes, and for the whole case (Bolton *v.* Sherman, 2 M. & W. 403). So, where counsel, in his opening, states, though he does not subsequently prove, his client to be in possession of a given document, this will, after notice to produce, admit secondary evidence thereof from his adversary (Duncombe *v.* Daniel, 8 C. & P. 222; approved in Haller *v.* Worman, *supra*; *contra*, Machell *v.* Ellis, 1 C. & K. 682, in which Pollock, C.B., declined to take the facts from the opening of counsel). Whether admissions made by counsel in his address to the jury in the presence of,

and not dissented from by, his client, are evidence against the latter on a new trial of the same action, seems doubtful; in Colledge *v.* Horn, 3 Bing. 119, Burrough, J., considered they were, but the rest of the Court declined to express an opinion; see R. *v.* Coyle, 7 Cox 74; Doe *v.* Ross, 7 M. & W. 102; Haller *v.* Worman, *supra*; Tay. s. 784; and Statements in a Party's Presence, *post*, p. 151. On the other hand, admissions made by counsel out of court in conversation with the solicitor for the opposite side are not evidence against his client (Richardson *v.* Peto, *supra*). As to the authority of counsel to compromise an action, see Matthews *v.* Munster, 20 Q. B. D. 141; *Re* West Devon Co., 38 Ch. D. 51; Rhodes *v.* Swithinbank, 22 Q. B. D. 577; Ellender *v.* Wood, 32 S. J. 628; Ros. N. P. 277, 278; Tay. s. 784, *note* (1), p. 680; and as to the avoidance of such a compromise for mistake, surprise, &c., see Harvey *v.* Croydon Union, 26 Ch. D. 249; Lewis *v.* Lewis, 63 L. T. 84; 39 W. R. 75.

Pleadings, although admissible in other actions, to show the institution of the suit and the nature of the case put forward, are regarded merely as the suggestions of counsel, and are not receivable against a party as admissions. (Boileau *v.* Rutlin, 2 Ex. 665; Tay. ss. 821–823, 1753); unless sworn, signed, or otherwise adopted by the party himself (Tay. s. 1753; Marianski *v.* Cairns, 1 Macq. H. L. 212; R. *v.* Walker, 1 Cox 99; R. *v.* Symonds, 4 Cox 277). So, *particulars* can only be taken as admissions in respect of the issues on which they are delivered (Miller *v.* Johnson, 2 Esp. 602; Burkitt *v.* Blanshard, 3 Ex. 89; Ros. N. P. 899).

So, generally, the affidavits, depositions, or *vivâ voce* statements of a party's *witnesses* are not receivable against him in subsequent proceedings. But documents or testimony which a party has expressly *caused to be made*, or *knowingly used as true*, in a judicial proceeding, for the purpose of proving a particular fact, are evidence against him in subsequent proceedings to prove the same fact, even on behalf of strangers; and it is immaterial, in such a case, whether the documents are originals or copies (Bricknell *v.* Hulse, 7 A. & E. 455; Gardner *v.* Moult, 10 A. & E. 464; Boileau *v.* Rutlin, 2 Ex. 675; Richards *v.* Morgan, 2 B. & S. 641; Pritchard *v.* Bagshaw, 20 L. J. C. P. 161; Simmons *v.* London, &c., Bank, 62 L. T. 427; White *v.* Dowling, 3 Ir. L. R. 128; and see *post*, p. 149).

Shipowner and Ship's Officers.—The *captain* of a ship may make admissions against the owners either in the official or ship's logs; in the protest (Pritch. Adm. Dig. 438); or in letters to, or conversations with, third persons. Thus, a statement by the captain of one vessel to the captain of another with which she had been in collision, that "it was a bad job, but could not be helped, as the mate was too close to the other vessel before he could see her," is evidence against the owners, although the captain was not on deck at the time, and only spoke from *hearsay* (The Actæon, 1 Spinks E. & A. 176). In The Solway, 10 P. D. 137, Hannen, J., admitted a letter from the captain to the owners, containing an account of a collision, on the ground that it was part of his duty to report to them all the circumstances of the voyage, though *opinions* expressed in the letter were rejected; see, however, *ante*, p. 138, as to reports from agent to principal.

The *officers and crew* cannot make admissions against the owners except in the official, ship's, or engineer's logs (The Solway, *supra;* The Earl of Dumfries, 10 P. D. 31; Pritch. Adm. Dig. pp. 438, 1616); nor can the *pilot* (The Schwalbe, Swab. 521).

So, depositions on oath before the Receiver of Wrecks under the Merchant Shipping Act, 1854, s. 448 (repealed by the M. S. Act, 1874, s. 45), made by the captain and crew, have been rejected as evidence either for or against the owners, whether the deponents were living or deceased at the time of the trial, and although such depositions were, by s. 449 of the former Act, expressly made evidence of the truth of the matters stated (The Little Lizzie, L. R. 3 A. & E. 56, on the ground that the depositions were not subject to cross-examination; The Solway, *supra;* The Henry Coxon, 3 P. D. 156; and see Nothard *v.* Pepper, 17 C. B. N. S. 37).

Entries in the log, or protest, are only evidence against, and not in favour of, the owners (The Earl of Dumfries, *supra;* The Sociadade, 1 W. Rob. 311; Pritch. Adm. Dig. p. 438).

As to the admissibility of the log as a public document, see *post*, p. 228.

Referror and Referee.—When one party refers to another for information or an opinion on a given subject, the information or opinion so given is receivable against the referror

as an admission [Tay. ss. 760–765; Ros. N. P. 69; Steph. art. 19; Whart. ss. 1190, 1191]. And it will be conclusive where there has been an agreement to refer, or where the position of the party tendering it has been altered thereby.

It is immaterial whether the disputed matter be one of law or fact; whether the referee has, or has not, any peculiar knowledge on the subject; or whether the reference is made expressly, or by conduct evincing an intention to rely on the statement as correct (Tay. ss. 761–763).

Thus, in an action against executors, the defendants having written to the plaintiff that if she wished for further information as to the assets, it could be obtained from a certain merchant—the replies of the merchant were held receivable against the executors (Williams *v.* Innes, 1 Camp. 364). In an action for goods sold and delivered, a statement by the defendant that he would pay for them if the plaintiff's carman would say he had delivered them, and the answer of the carman asserting the delivery, are evidence of that fact against the defendant (Daniel *v.* Pitt, 1 Camp. 366, *n.*). And where A. agrees to admit a claim provided B. will make an affidavit in support of it, B.'s affidavit is evidence against A. (Lloyd *v.* Willan, 1 Esp. 178). The question being whether a horse in the defendant's possession was identical with one lost by the plaintiff, and the latter having stated that if the former would swear the horse was his own, he might keep it, the defendant's statement on oath that the horse was his was received as evidence, though not conclusive, against the plaintiff (Garnet *v.* Ball, 3 Stark. 160; Sybray *v.* White, 1 M. & W. 435). So, A. and B. having agreed to abide by the decision of a barrister on a disputed question of title, the opinion so given is evidence against both, although it might be invalid as an award (Downs *v.* Cooper, 2 Q. B. 256; Price *v.* Hollis, 1 M. & S. 105; Sybray *v.* White, *supra*). And if a party in his examination refers to the testimony of another witness taken in his hearing, such testimony becomes evidence against him of the truth of statements, or as explanatory of his own testimony, according to the manner in which the reference is made (3 Russ. Cr. 487, *note* (*e*)). The same rule, perhaps, applies to criminal cases. Thus, where the accused told a constable that his wife would make out a list of certain property, a list afterwards made

out by her was held evidence against her husband (R. *v.* Mallory, 15 Cox 458, 13 Q. B. D. 33); here the list was handed to the constable in the husband's presence. Coleridge, C.J., however, expressly refrained from giving an opinion upon the question if the prisoner had been absent.

(E) **MISCELLANEOUS CASES.—Bankrupt and Creditors.**—The admissions of a debtor made before his bankruptcy are receivable to prove the petitioning creditor's debt (Coole *v.* Braham, 3 Ex. 185); but if made after bankruptcy, they are not evidence against either the trustee or the creditors, because of the danger of fraud (Tay. s. 756; *Ex parte* Edwards, *Re* Tollemache, 14 Q. B. D. 415; *Ex parte* Revell, *Re* Tollemache, 13 Q. B. D. 720). So, his answers on public examination are inadmissible even in subsequent stages of the same bankruptcy, against all parties other than himself (*Re* Brunner, 19 Q. B. D. 573).

Sheriff and Under-sheriff.—The admissions of an under-sheriff or bailiff in his official capacity are evidence against the sheriff; and the relationship between them being that of principal and deputy (or *quasi*-principal), and not principal and agent, it is immaterial to inquire into the scope of the deputy's authority, for no action lies against him (Snowball *v.* Goodricke, 4 B. & Ad. 541; Jacobs *v.* Humphreys, 2 C. & M. 413; Scott *v.* Marshall, 2 C. & J. 238; North *v.* Miles, 1 Camp. 389; Edwards on Execution, p. 72).

In actions against the sheriff for not executing process against debtors, statements of the debtor admitting his debt to the execution creditor are evidence against the sheriff (Coole *v.* Braham, 3 Ex. 183).

Arbitrator and Parties.—The admissions of an arbitrator as to his own misconduct in a reference are not receivable against a party to the proceedings unless made in the latter's presence (*Re* Whiteley (1891), 1 Ch. 558).

CHAPTER XXI.

STATEMENTS IN THE PRESENCE AND DOCUMENTS IN THE POSSESSION OF A PARTY.

STATEMENTS made in the presence and hearing of a party, and documents found in his possession, or to which he has access, are evidence against him of the truth of the matters stated, if by his conduct or silence he has acquiesced in their contents.

A party may, on similar grounds, be affected by the acquiescence of his agents or others for whose admissions he is responsible (Haller *v.* Worman, 3 L. T. N. S. 741; Price *v.* Woodhouse, 3 Ex. 616).

Principle.—The mere fact that statements have been made in a party's presence, or documents found in his possession, though it may render them admissible against him as original evidence—*e.g.*, as showing knowledge or complicity—will afford no proof *per se* of the truth of their contents; the ground of reception for the latter purpose is that the party has, by his conduct or silence, admitted the accuracy of the assertions made.

[Tay. ss. 809–816; Best, ss. 574, 575; Ros. N. P. 64–66; Powell, 258–272; 3 Russ. Cr. 485–489; Steph. art. 8; Whart. ss. 1136–1155.]

STATEMENTS.[a]—When statements made in a party's presence have been *replied to*, they will be evidence against him of the facts stated to the extent that his answer directly or indirectly admits their truth (Tay. s. 815; Child *v.* Grace, 2 C. & P. 193; Jones *v.* Morrell, 1 C. & K. 266; R. *v.* John, 7 C. & P. 324); while his denial will render them nugatory, if not altogether inadmissible (R. *v.* Welsh, 3 F. & F. 275;

see *note* to this case, 3 Russ. Cr. 488; Jones *v.* Morrell, *supra*).

So, a party's *silence* will render statements made in his presence (or hearing only: Neile *v.* Jackle, 2 C. & K. 709) evidence against him of their truth, when he is reasonably called on to reply to such statements.

And even where the matter is not within his knowledge (Hayslep *v.* Gymer, 1 A. & E. 165; Price *v.* Burva, 6 W. R. 40; R. *v.* Cox, 1 F. & F. 90; R. *v.* Mallory, 15 Cox 458), or the statements are not directly addressed to him (R. *v.* Cox, *supra*; R. *v.* Mallory, *supra*); the evidence is, it seems, strictly admissible, although its weight may be slight.

But when the circumstances are such that a reply cannot properly be expected, the party's silence will afford no inference of assent. Thus, the officious observations of a mere stranger may often best be rebuked in this manner (Child *v.* Grace, 2 C. & P. 193; Lucy *v.* Mouflet, 5 H. & N. 229; Wiedemann *v.* Walpole (1891), 2 Q. B. 534). So, statements made in a party's presence during a trial are not generally receivable against him merely on the ground that he did not deny them, for the regularity of judicial proceedings prevents the free interposition allowed in ordinary conversation (Melen *v.* Andrews, M. & M. 336; R. *v.* Appleby, 2 Stark. N. P. C. 33; R. *v.* Turner, 1 Moo. C. C. 347; Child *v.* Grace, 2 C. & P. 193; though see Colledge *v.* Horn, 3 Bing. 19, and *ante*, p. 143). Even here, however, cases may occur in which the refusal of a party to repel a charge made in a court of justice (Simpson *v.* Robinson, 12 Q. B. 512), or to cross-examine or contradict a witness (R. *v.* Coyle, 7 Cox 74), or to reply to an affidavit (Morgan *v.* Evans, 3 C. & F. 159, 203; Freeman *v.* Cox, 8 Ch. D. 148; Hampden *v.* Wallis, 27 Ch. D. 251), may afford a strong presumption that the imputations made against him are correct.

In America, silence has been rejected as evidence of assent to statements made in a party's presence when he was drunk (State *v.* Perkins, 3 Hawks. 377); asleep (Lanergan *v.* People, 39 N. Y. 39); deaf (Tufts *v.* Charlestown, 4 Gray 537); ignorant of the language (Wright *v.* Maseras, 56 Barb. N. Y. 521); in custody (Com. *v.* Walker, 13 Allen (Mass.) 570; though see R. *v.* Cox, *supra*); or had for a proper purpose promised to keep silence (Slattery *v.* People,

76 Ill. 217); so, where the statements were those of a minister made during divine service (Johnson *v.* Trinity Church, 11 Allen 123).

DOCUMENTS.[b]— Documents in a party's possession which he has in any way *recognised*, *adopted*, or *acted upon*, are, generally speaking, evidence against him of the truth of their contents. So, as we have seen, documents which a party has *caused to be made* or *knowingly used as true* in a judicial proceeding to prove a particular fact, are admissible against him in subsequent proceedings to prove the same fact even on behalf of strangers (*ante*, p. 143). And where a party has *invited* a letter it may, it seems, be received against him as some proof of its contents, even though only constructively in his possession (R. *v.* Cooper, 1 Q. B. D. 19).

The mere *failure to answer a letter or object to an account*, however, will not generally imply an admission of its contents. "What is said to a man's face he is in some degree called on to contradict, if he does not acquiesce in it; but it is too much to say that a man by omitting to answer a letter admits the truth of the statements it contains" (Fairlie *v.* Denton, 3 C. & P. 103, *per* Lord Tenterden); or "that every paper a man holds purporting to charge him with a debt or liability is evidence against him" (Doe *v.* Frankis, 11 A. & E. 792, *per* Lord Denman; and see Richards *v.* Gellatly, L. R. 7 C. P. 127; Wiedemann *v.* Walpole, *supra*). But it is otherwise if the letter is sent under circumstances which *entitle* the writer to an answer (Edwards *v.* Towels, 5 M. & G. 624; Richardson *v.* Dunn, 2 Q. B. 218; Gaskill *v.* Skene, 14 Q. B. 664; Fairlie *v.* Denton, *supra*; Lucy *v.* Mouflet, 5 H. & N. 229; Freeman *v.* Cox, 8 Ch. D. 148; Hampden *v.* Wallis, 27 Ch. D. 251). So, in the case of merchant's accounts, a presumption of correctness will generally arise unless objection be made within a reasonable time; and objection to one item only may imply assent to the others (Tay. s. 810).

Access to documents, if coupled with due opportunity of testing their accuracy, may also, by raising a presumption of knowledge and non-objection, sometimes affect a party with an implied admission of their correctness (Tay. s. 812). Thus, the rules of a club or the proceedings of a society, recorded by the proper officer and accessible to the members

(Raggett *v.* Musgrave, 2 C. & P. 556; Alderson *v.* Clay, 1 Stark. 405; Ashpitel *v.* Sercombe, 5 Ex. 147); or an account-book kept openly in a club-room (Wiltzie *v.* Adamson, 1 Phil. Ev. 357), are evidence against the members. And so, generally, with books kept between master and servant, trader and shopman, or banker and customer.

Partnership books, being accessible to all the partners, and kept more or less under their individual supervision, may also generally be received as *primâ facie* evidence *inter se* (Lindley, Partnership, 536; O. 33, r. 3); unless the entries can in fact be proved to have been made without the knowledge of any particular partner, when, as against him, they will, it seems, be inadmissible (Hutchinson *v.* Smith, 5 Ir. Eq. 117; Stewart's case, 1 Ch. App. p. 587; *ante*, p. 137).

This presumption of correctness, however, does not apply to the case of a director with respect to the books of a company; there being no inference of knowledge from his merely acting as such, nor any duty upon him to know their contents (Hallmark's case, 9 Ch. D. 329). Nor are shareholders, as between themselves and their directors, presumed to have such knowledge (Lindley, Company Law, 312). And entries in the books of a corporation upon private matters are not evidence against its members (unless made so by statute), even though they have a legal right of inspection, unless their acquiescence in the entries is shown (Hill *v.* Manchester, &c., Co., 5 B. & Ad. 866; Corporation of Waterford *v.* Price, 9 Ir. L. R. 310; see *post*, p. 245).

EXAMPLES.

Admissible.

(*a*) A. is indicted for receiving property alleged to have been stolen by B. A confession made by B. to a constable, in the presence of, and not denied by, A., that he (B.) had stolen the goods, is admissible against A. to prove that fact (R. *v.* Cox, 1 F. & F. 90). So, on a similar charge against A., who was a marine store dealer, a constable having asked him where he had bought the goods, to which he replied

Inadmissible.

(*a*) A. is indicted for receiving property alleged to have been stolen by B. A confession made by B. to a magistrate on the hearing of the charge, in the presence of, and not denied by, A., that he (B.) had stolen the goods, is not admissible against A. to prove that fact (R. *v.* Appleby, 3 Stark. 33; R. *v.* Turner, 1 Moo. C. C. 347).—So, with remarks by a magistrate (Child *v.* Grace, 2 C. & P. 193); or prose-

Admissible.	*Inadmissible.*
that his wife would make out a list of the things;—a list subsequently handed to the constable by A.'s wife, who remarked in A.'s presence, "This is the list of what we bought, and what we gave for them," is admissible against A., although he had not read the list; the statement was not addressed to him; and his wife was not a competent witness (R. *v.* Mallory, 15 Cox 458, 13 Q. B. D. 33).	cutor (Finden *v.* Finden, M. & M. 461); or the depositions of witnesses (Melen *v.* Andrews, *id.* 336. In R. *v.* Edmunds, 6 C. & P. 164, and Jones *v.* Morrell, 1 C. & K. 266, such depositions were admitted, not as evidence of their truth, but as producing a *reply* from the prisoner. In R. *v.* Maun, 49 J. P. 743, they were received for the former purpose, *sed qu.*; and in this case and R. *v.* Edmunds, the witness being dead, the evidence might have been supported as testimony given in former trials, 3 Russ. Cr. 487 (*g*)).
A. sues B. for money paid by A. as B.'s surety to C.;—a statement made by A. to B., that the former had paid the money to C., which B. did not at the time deny, is evidence against B. to prove the fact (Price *v.* Burva, 6 W. R. 40).	
A. sues B. for breach of promise of marriage; an oral statement made by A. to B., "You know you have always promised to marry me, and now you don't keep your word," to which B. made no answer, is admissible to prove the promise (Bessela *v.* Stern, 2 C. P. D. 265). In divorce cases evidence of this kind will not dispense with the necessity of calling witnesses, if they are available, to prove the facts admitted (White *v.* White, 62 L. T. 663).	A. sues B. for breach of promise of marriage; a letter written by A. to B., stating that B. had promised to marry A., to which letter B. did not reply, is not admissible either in proof or corroboration of the promise (Wiedemann *v.* Walpole (1891), 2 Q. B. 534; nor is a similar letter written to B. by the clergyman of A.'s parish: *ibid.*).
A.'s counsel makes a statement in an interlocutory proceeding before a judge in chambers which conduces to a decision in A.'s favour. The statement is made in the presence of A.'s solicitor, who does not deny it. This statement is evidence against A. on the hearing of the action (Haller *v.* Worman, 3 L. T. N. S. 741; it is also evidence as an admission by A.'s counsel: *ante*, 142).	A. indicts B. for libel in describing him as a swindler. On the publication of the libel A. had sent a friend to B. to demand an explanation, and B. had thereupon shown the friend a copy of a French police report in which B. was similarly described. This report is not evidence against A. of the *facts* stated, as the friend was not his agent for the purpose of making admissions (R. *v.* Labouchere, 14 Cox 419. The report was admitted to show the *bona fides* of the de-

Admissible.	*Inadmissible.*
	fence, but not to justify the libel: *ante*, p. 58).
	A. sues B., an underwriter, in respect of the loss of a vessel. A.'s shipping agents having written to C., a passenger by the vessel, for information as to its loss, used C.'s reply to induce B. to pay the policy-moneys. The statements contained in this letter are not evidence against A. as admissions by his agent (Cottle *v.* Champion, 2 Peake 45, and White *v.* Dowling, *infra*).
(*b*) In an action between A. and B. an affidavit which A. had, in a former suit between himself and C., knowingly used to prove a certain fact, is evidence against A. of the same fact, though the deponent is present in court and might be called as a witness (Bricknell *v.* Hulse, 7 A. & E. 454).	(*b*) In an action between A. and B., an affidavit which had, in A.'s absence and without his knowledge, been made and used by his attorney's clerk in an earlier stage of the same action, is not admissible in proof of the facts stated against A. (White *v.* Dowling, 8 Ir. L. R. 128).
In an action by A., a copyholder, against B., the lord of a manor, a copy of an ancient decree establishing the customs of the manor, which B. had given C. in proof thereof, is primary evidence of such customs against B. (Price *v.* Woodhouse, 3 Ex. 616).	In an action by A., a copyholder, against B., the lord of a manor, a copy of an ancient decree establishing the customs of the manor, which had been found deposited among the papers of a former deceased lord, is not admissible against B. as primary evidence of such customs, in the absence of evidence that the former lord had dealt with it as a true account thereof (Price *v.* Woodhouse, *supra*. Such possession, however, was regarded as a sufficient recognition of the document as a true *copy* of the decree, to admit it as secondary evidence on proof of the loss of the original).
A. is charged with obtaining, and attempting to obtain, money by false pretences from four persons, by means of an advertisement offering employment to all who would send the advertiser 1*s.* in stamps. Letters	A., a letter-carrier, is charged with secreting a letter containing a bill of exchange. The letter, which is found in his possession, states that the bill is enclosed. The letter is not admissible to prove that the bill

Admissible.	*Inadmissible.*
from 281 other persons, expressed to be in answer to the advertisement, and each enclosing 12 stamps, which letters were intercepted by the postmaster, and had never, in fact, reached A.;—held, admissible against him (R. *v.* Cooper, 1 Q. B. D. 19). It is not quite clear whether the Court in this case deemed the letters admissible in proof of the facts stated, or merely as original evidence showing a fraudulent design. Mr. Wharton thinks the former view can be supported, on the ground that the letters were *invited* by A., and were in the possession of the postmaster as his agent (Whart. s. 1154, *note;* see Cottle *v.* Champion, *supra*, for a case where a letter invited by a party's agent was rejected).	was enclosed, though it may be read against A. as being in his possession (R. *v.* Plumer, R. & R. 264). So, when letters from a third person, found in a bankrupt's possession after his bankruptcy, but bearing post-marks before it, referred to requests made by the bankrupt for assistance, which the writer declined to give, the letters were rejected as proof of their contents, though admitted to show the bankrupt's knowledge of his position (Vacher *v.* Cocks, M. & M. 353; Cotton *v.* James, M. & M. 275).
A. sues B. for work done at a house occupied by the latter, but owned by C. A. had, through his agent, sent his bill to B., and B. had replied to the agent that before the work was begun A. was informed it would be paid for by C., who must be looked to for payment. A. saw this letter, and did not at the time deny the facts stated. Held, that the letter was evidence against him that C., and not B., was liable (Carne *v.* Steer, 5 H. & N. 628).	A. is charged with libelling B. A.'s similar libel, published by C. against B. some time before, had been brought to A.'s notice, but he had taken no proceedings against C.;—held, that C.'s libel was not admissible to prove the truth of the imputations contained, on the ground that B. had by his conduct impliedly admitted its truth (R. *v.* Newman, 1 E. & B. 268; R. *v.* Holt, 5 T. R. 436; and see Wiedemann *v.* Walpole, examples (*a*), *supra*).

CHAPTER XXII.

CONFESSIONS.

In criminal cases, a confession made by the accused *voluntarily* is evidence against him of the facts stated. But a confession made after suspicion has attached to or a charge been preferred against him (R. *v.* Gillis, 11 Cox 69, *per* Fitzgerald, B.; R. *v.* Tubby, 5 C. & P. 530; Greenl. s. 215), and which has been induced by any promise or threat relating to the charge, and made by or with the sanction of a person in authority, is deemed *not to be voluntary*, and is inadmissible.

Principle.—The ground of reception in the former case is the presumption that no person will voluntarily make a statement against his interest unless it be true. The ground of rejection in the latter is the danger that the prisoner may be induced, by hope or fear, to criminate himself falsely (3 Russ. Cr. 442; Joy, 51. In R. *v.* Baldry, 2 Den. 430, however, this ground was denied by Pollock, C.B., and Campbell, C.B., who stated the reason to be that it would be unsafe for juries to act upon confessions made under a bias; though see remarks of the former *arguendo*, and of the latter in R. *v.* Scott, 1 D. & B. 47, recognising the first-mentioned principle. Mr. Taylor suggests as a further reason for the exclusion, that the reception of such evidence might encourage the police, in the hope of professional advancement, to extort criminatory statements from their prisoners: s. 874).

Burden of Proof.—Whether it lies upon the prosecution to negative, or upon the prisoner to establish, undue influence, admits of some doubt. The former was held by

Parke, B., in R. *v.* Warringham, 2 Den. 447; and see R. *v.* Swathins, 4 C. & P. 548; and R. *v.* Gillis, 17 Ir. C. L. Rep. 512, *per* Fitzgerald, B., though the weight of authority seems in favour of the latter view; R. *v.* Clewes, 4 C. & P. 221; R. *v.* Taylor, 8 C. & P. 734, *per* Patteson, J., expressing the opinion of the judges; R. *v.* Williams, 3 Russ. Cr. 497; R. *v.* Garner, 1 Den. 329, Ros. Cr. Ev. 40. If there is reason to suspect improper influence, however, it is usual for the prosecution to negative it (Ros. Cr. Ev. 53).

[Tay. ss. 862–906; Best, ss. 551–553; 3 Russ. Cr. 440–499; Ros. Cr. Ev. 38–54; Powell, 295–306; Steph. art. 21–24; Joy on Confessions.]

(i.) **Persons in Authority.**[a]—To exclude a confession, the inducement must have been held out by a person in authority—*i.e.*, some one engaged in the *arrest*, *detention*, *examination*, or *prosecution* of the accused; or by some one acting in the presence, and without the dissent, of such a person (3 Russ. Cr. 468; R. *v.* Poulteney, 7 C. & P. 302; *Re* Spencer, *ibid.* 776; R. *v.* Taylor, *supra;* R. *v.* Drew, 8 C. & P. 140; R. *v.* Simpson, 1 Moo. C. C. 410; and *note* 3 Russ. Cr. 470; R. *v.* Laugher, 2 C. & K. 225; R. *v.* Millen, 3 Cox 507; R. *v.* Hewett, C. & M. 534; R. *v.* Luckhurst, 2 Dears. 245; R. *v.* Jones, 49 J. P. 728; *contra*, R. *v.* Parker, 8 Cox 465, where, however, no counsel appeared and no reasons are given; see Ros. Cr. Ev. 45); or, perhaps, by some one erroneously believed by the accused to be in authority (see 3 Russ. Cr. 465, and *note;* R. *v.* Frewin, 6 Cox 530; Tay. s. 874; though there is no express decision).

The following have been held to fall within the definition:—A constable, or other officer, having the accused in custody (R. *v.* Shepherd, 7 C. & P. 579; R. *v.* Gillis, *supra;* or, in cases of felony, perhaps a private person arresting, 3 Russ. Cr. 464, and *note:* Ros. Cr. Ev. 44); the prosecutor (R. *v.* Jenkins, R. & R. 492); or his wife (R. *v.* Upchurch, 1 Moo. C. C. 465); or partner's wife, if the offence concerns a partnership (R. *v.* Warringham, *supra*); or his attorney, (R. *v.* Croydon, 2 Cox 67); the master or mistress of the prisoner, if the offence has been committed against the person or property of either, but otherwise not (R. *v.* Moore, 2 Den. 522); a magistrate, whether acting in the case or not (R. *v.* Gillis, *supra;* R. *v.* Clewes, 4 C. & P. 221); the magistrates' clerk (R. *v.* Drew, 8 C. & P. 140).

It is doubtful whether a private person, to whose temporary custody the accused has been committed by a constable, is a person in sufficient authority (the affirmative was held in R. *v.* Enoch, 5 C. & P. 539; and R. *v.* Windsor, 4 F. & F. 366, the case of a female searcher; and see Ros. Cr. Ev. 45, and 3 Russ. Cr., 471; *contra* in R. *v.* Sleeman, 2 Dears. 249, and R. *v.* Vernon, 12 Cox 153; and see Tay. s. 873, *note*); or the chaplain of a gaol (the affirmative is stated in 3 Russ. Cr. 464, citing R. *v.* Gilham, 1 Moo. C. C. 186, but *quære* whether this case is any authority for the point: Ros. Cr. Ev. 43, 44); or a surgeon (R. *v.* Kingston, 4 C. & P. 387; R. *v.* Gibbons, 1 C. & P. 97, and R. *v.* Bowden, cited Tay. s. 880, *note*, support the affirmative, though it is difficult to see upon what ground; see R. *v.* Cain, 1 Craw. & D. C. C. 37); or the husband of the prisoner (R. *v.* Laugher, 2 C. & K. 225). The captain of a ship, merely as such, would seem not to be in such a position with regard to the crew (R. *v.* Moore, 2 Den. 526, explaining that in R. *v.* Parratt, 4 C. & P. 570, *contra*, the captain had threatened to take part in the prosecution); nor is the wife of a constable a person in authority (R. *v.* Hardwick, 1 C. & P. 98, *note* (*b*)).

A confession made to, but not induced by, a person in authority is admissible (R. *v.* Gibbons, *supra*; R. *v.* Tyler, 1 C. & P. 129); while, conversely, a confession induced by, though not made to, such a person will be rejected (R. *v.* Boswell, C. & M. 584; R. *v.* Blackburn, 6 Cox 333).

(ii.) **The Inducement.**[(b)]—A promise or threat, in order to exclude a confession, must *relate to the charge—i.e.*, must reasonably imply that the prisoner's position with reference to it will be rendered better or worse according as he does or does not confess (Tay. ss. 879–881; 3 Russ. Cr. 42, 43; Steph. art. 22).

It need not be *express*, but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case (R. *v.* Gillis, *supra*); nor need it be made *directly to the prisoner;* it is sufficient if it may reasonably be presumed to have come to his knowledge, providing, of course, it appears to have induced the confession (R. *v.* Harding, 1 Arm. M. & O. 340; R. *v.* Boswell, C. & M. 584; R. *v.* Blackburn, 6 Cox 633; R. *v.* Dingley, 1 C. & K. 637; Tay. s. 885).

But a promise or threat to *one prisoner* will not exclude a confession made by another who was present and heard the inducement (R. *v.* Jacobs, 4 Cox 54; R. *v.* Bate, 11 Cox 686); nor will an inducement to confess as to *one crime* invalidate a confession as to a different one (R. *v.* Warner, 3 Russ. Cr. 452, *note*); unless both are parts of the same transaction (R. *v.* Hearn, 1 C. & M. 109). So, it has been considered that a confession induced by a *conditional promise* relating to the charge will not be excluded if the prisoner has violated the condition (R. *v.* Dingley, 1 C. & K. 640; and see R. *v.* Burley, 2 Stark. Ev. 13, *note*, afterwards confirmed by all the judges: Tay. s. 881; but *contra* in Ireland, R. *v.* McHugh, 7 Cox 483; R. *v.* Gillis, *supra*, explaining R. *v.* Burley: see also on this subject Ros. Cr. Ev. 125–127; 3 Russ. Cr. 449, 600–602). Neither will a confession be excluded which has been obtained from the accused by an inducement relating to some *collateral matter* unconnected with the charge (Tay. s. 880); or by *moral or religious exhortation* (whether by a chaplain: R. *v.* Gillam, 1 Moo. C. C. 186; or others: R. *v.* Jarvis, L. R. 1 C. C. R. 96; R. *v.* Reeve, *ibid.* 362); or by a *promise of secrecy* (R. *v.* Shaw, 6 C. & P. 372; Com. *v.* Knapp, 9 Pick. 496); or even by *false representations* made to, or *deception* practised upon, him (R. *v.* Derrington, 2 C. & P. 418; R. *v.* Burley, *supra*); or by his having been *made drunk* for the purpose (R. *v.* Spilsbury, 7 C. & P. 187); or by *questions* which he need not have answered having been put to him, whether by a magistrate, constable, or private person (R. *v.* Rees, 7 C. & P. 569; R. *v.* Bartlett, *ibid.* 832: R. *v.* Ellis, Ry. & M. 432; R. *v.* Thornton, 1 Moo. C. C. 27; R. *v.* Wild, *ibid.* 452; R. *v.* Kerr, 8 C. & P. 176; R. *v.* Johnson, 15 Ir. L. R. N. S. 60; Tay. s. 881; 3 Russ. Cr. 472; Ros. Cr. Ev. 48; Steph. art. 24; Joy, 34–44; *contra*, R. *v.* Devlin, 2 Cr. & Dix. 152; R. *v.* Bodkin, 9 Cox 403; R. *v.* Gavin, 15 Cox 656, seem not to be law; it is, however, improper for such questions to be put); or by his having been allowed to speak *without previous caution* (R. *v.* Thornton, *supra*; R. *v.* Long, 6 C. & P. 179; Tay. s. 881; Steph. art. 24).

So, evidence given by a person *on oath as a witness*, in a proceeding having reference to the same or a different matter, is receivable against him as a confession (R. *v.* Chidley, 8 Cox 365; R. *v.* Coote, 12 Cox 557; 3 Russ.

Cr. 473–482; Tay. ss. 897–899; Ros. Cr. Ev. 119; Steph. art. 23; *unless* his testimony was obtained by any inducement (R. *v.* Gillis, *supra;* R. *v.* Cherry, 12 Cox 32;) or *unless* he was improperly compelled to answer the criminating questions after claiming privilege (R. *v.* Garbett, 1 Den. 236; R. *v.* Coote, *supra;* Tay. s. 900; 3 Russ. Cr. 482; Steph. art. 23: the grounds of exclusion in this case being, it seems, not that the statement is likely to be untrue, but that it is expedient to uphold the privilege of witnesses). The same rule applies to compulsory examinations in bankruptcy: *ante*, p. 114. And as to the statutory examination of prisoners before magistrates, which must *not* be on oath, and the caution necessary to be given, see 11 & 12 Vict. c. 42, s. 18; Tay. ss. 888–901; 3 Russ. Cr. 499–510; Ros. Cr. Ev. 55–60; and *post*, Depositions).

Illegal imprisonment has been held to exclude a confession (R. *v.* Ackroyd, 1 Lew. C. C. 49; but see R. *v.* Thornton, *ibid.* 49; Tay. s. 883; 3 Russ. Cr. 458, *note*).

(iii.) **Removal of the Inducement.**[c]—If the impression produced by the promise or threat is clearly shown to have been removed—*e.g.*, by lapse of time, or by an intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement—a confession subsequently made will be strictly receivable (Tay. s. 878; Ros. Cr. Ev. 45–48; 3 Russ. Cr. 458–463; Steph. art. 22.)

(iv.) **Facts discovered in Consequence of Inadmissible Confessions.**[d]—The fact that property has been delivered up in consequence of an inducement to confess, or has been discovered through the help of an inadmissible confession, may always be proved, together with so much of the confession as strictly relates to such fact, for these portions at least cannot be untrue; but independent statements not qualifying or explaining the fact, though made at the time, will be rejected (R. *v.* Butcher, 1 Lea. 265, *note;* R. *v.* Griffin, R. & R. 151; R. *v.* Harris, cited Joy, 83; R. *v.* Gould, 9 C. & P. 364. The earlier rule admitted the facts, but excluded the accompanying statements: R. *v.* Warwickshall, 1 Lea. 263, and cases cited 165, *note;* R. *v.* Cain, 1 Cr. & D. 37).

If the inadmissible confession be *not confirmed* by the finding of the property, no proof either of the statements

or acts can be received; for the influence which produces a groundless confession may equally produce groundless conduct (R. *v.* Jenkins, R. & R. 492).

[Tay. ss. 902, 903; 3 Russ. Cr. 482–485; Ros. Cr. Ev. 49; Steph. art. 22; Joy, 81–88.]

(v.) **To and by whom Confessions may be made.**[o]—It is in general immaterial *to whom* a voluntary confession has been made. Thus, statements which the accused has been overheard muttering to himself (R. *v.* Simons, 6 C. & P. 540; if otherwise than in his sleep: R. *v.* Sippet, cited Tay. s. 881), or making in confidence to his wife or solicitor, are admissible against him, provided, in the latter case, that they are independently proved (Tay. s. 881. In R. *v.* Pamenter, 12 Cox 177, Kelly, C.B., rejected a letter from a prisoner to his wife, which had been intercepted by a constable who had undertaken to post it, apparently on the ground that the letter really belonged to the wife, who could not have been called to produce it had it reached her hands; but this case is probably not law: Tay. s. 881, *note;* and see R. *v.* Derrington, 2 C. & P. 418).

On the other hand, a prisoner can only be affected by the confessions of *himself*, and not by those of *agents, accomplices, or strangers* (R. *v.* Turner, 1 Moo. C. C. 347; R. *v.* Gardner, 9 Cox 332; Tay. ss. 904–906; 3 Russ. Cr. 485–491; Ros. Cr. Ev. 49–51), unless made in his presence and assented to by him (R. *v.* Cox, 1 F. & F. 90; R. *v.* Mallory, 15 Cox 458). Nor of course can such confessions be used in his favour (Gray's case, Ir. Cir. Rep. 76).

And if the confession of one prisoner implicate others by name, though the whole confession must be received, yet it will be the duty of the judge to warn the jury that it is only evidence against the maker (Tay. ss. 870, 871; Ros. Cr. Ev. 50.)

It is very doubtful if the *prosecutor* is sufficiently a party to the inquiry to render his admissions evidence for the accused, although they may of course be proved to impeach his own testimony as a witness (Ros. Cr. Ev. 51; in R. *v.* Arnall, 8 Cox 439, a case of rape, Martin, B., admitted statements made in the presence of the prosecutrix as evidence for the prisoner, but this decision does not seem to be satisfactory: see *note*, 3 Russ. Cr. 489).

EXAMPLES.

Admissible.

(*a*) A., a maid-servant, being charged with concealing the birth of her illegitimate child, makes a confession in consequence of an inducement held out by her mistress;—the confession is admissible, for the mistress is not a person in authority, the offence having no connection with the management of the house (R. *v.* Moore, 2 Den. 522).

(*b*) Confessions induced by the following promises or threats from persons in authority have been admitted.

A promise to give the prisoner a glass of spirits (R. *v.* Sexton, *contra*, cited Joy, 17–19, is not law: Tay. s. 880); or to strike off his handcuffs (R. *v.* Green, 6 C. & P. 655); or to let him see his wife (R. *v.* Lloyd, *ibid.* 393); for these are matters collateral to the charge.

"Be sure to tell the truth" (R. *v.* Court, 7 C. & P. 486; R. *v.* Holmes, 1 Cox 247); "If you have committed a fault, do not add to it by saying what is untrue" (R. *v.* Jarvis, L. R. 1 C. C. R. 96); "*You had better, as good boys, tell the truth*" (R. *v.* Reeve, *ibid.* 362); "Kneel down and tell me the truth in the presence of the Almighty" (R. *v.* Wild, R. & M. 452); "Don't run your soul into more sin, but tell the truth" (R. *v.* Sleeman, Dears. 269), for these are mere admonitions on moral or religious grounds.

"I must know more about it" (R. *v.* Reason, 12 Cox 228); "Now is the time for you to take it [the stolen property] back to the prosecutrix" (R. *v.* Jones, 12 Cox 241); "You would not have told so many falsehoods

Inadmissible.

(*a*) A., a maid-servant, being charged with setting fire to her master's house, makes a confession in consequence of an inducement held out by her mistress;—the confession is inadmissible, for the mistress is a person in authority, the offence relating to her husband's property (R. *v.* Upchurch, 1 Moo. C. C. 465).

(*b*) Confessions induced by the following promises or threats from persons in authority have been excluded:—

"It is no use to deny it, for there are the man and boy who will swear they saw you do it" (R. *v.* Mills, 6 C. & P. 146); "I dare say you had a hand in it; *you may as well tell me all* about it" (R. *v.* Croydon, 2 Cox 67); "The inspector tells me you are making housebreaking implements; if that is so, *you had better tell the truth*" (R. *v.* Fennell, 7 Q. B. D. 147; R. *v.* Hatts, 49 L. T. 780; 48 J. P. 248; "The words 'you had better' seem to have acquired a sort of technical meaning," *per* Kelly, C.B.: R. *v.* Jarvis, *supra*); "It would have been better if you had told at first" (R. *v.* Walkley, 6 C. & P. 175).

"If you tell me where my goods are, I will be favourable to you" (R. *v.* Cass, 1 Lea. 293, *note*). A servant in the custody of a constable said to her mistress, "If you forgive me, I will tell the truth;" the mistress replied, "Anne, did you do it?" (R. *v.* Mansfield, 14 Cox 639). So, where the mistress said, "If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; pray

Admissible.

had you not been concerned in it. Did any one induce you to do it?"—for no promise or threat is thereby imported.

"What you say will be used as evidence against you," or "for or against you" (R. *v.* Baldry, 2 Den. 430, overruling several earlier cases). "You are in the presence of two police officers; I should advise that to any question put to you, you will answer truthfully. . . . . Take care we know more than you think we know" (R. *v.* Jarvis, *supra*), for such language imports a mere caution.

A magistrate having told the prisoner that his wife had already confessed the whole and that there was enough case against him to send a bill before the grand jury, asked him what he had to say. A confession then made by the prisoner held admissible as the magistrate's statement merely amounted to a caution (Wright's case, 1 Lew. 48, and see R. *v.* Long, 6 C. & P. 179).

A. and B., apprentices, are charged with robbing their master. The master had told A., in the presence of B., that if he did not confess, a constable would be sent for. A. then admitted that both of them had robbed their master; whereupon B. said: "You are a liar; I only took one handkerchief."—B.'s confession is admissible, as the threat was not made to him; but A.'s is not (R. *v.* Jacobs, 4 Cox 54; and see R. *v.* Bate, 11 Cox 686, where a confession by a prisoner was received, although an inducement

Inadmissible.

tell me if you did it" (R. *v.* Upchurch, 1 Moo. C. C. 465). "If I tell the truth shall I be hung?" "No, nonsense, you will not be hung" (R. *v.* Windsor, 4 F. & F. 366). "I only want my money, if you give me that you may go to the devil!" (R. *v.* Jones, R. & R. 152).

"If you don't tell me, you may get yourself into trouble, and it will be the worse for you" (R. *v.* Coley, 10 Cox 536). "If you don't tell me I will send for a constable" (R. *v.* Richards, 5 C. & P. 318). "I shall be obliged if you would tell me what you know about it; if you will not, of course we can do nothing for you" (R. *v.* Partridge, 7 C. & P. 551).

A., a postman, being in custody for tampering with letters, a superior clerk in the post-office said to A.'s wife, "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation." A confession afterwards made by A. held inadmissible, as the wife might have communicated the inducement to him (R. *v.* Harding, 1 Arm. M. & O. 340; but see R. *v.* Bate, *supra*).

A. is charged with setting fire to the house of B., her master. Shortly after the fire some of B.'s goods had been found concealed in the garden of the house. B. thereupon said to A.: "If you don't tell me the truth about the things found in the garden, I will send for a constable." A. then confessed having set fire to the house. This confession is inadmissible, as the threat was made with regard to a crime which, though different, formed part of the same transaction as the first (R. *v.* Hearn, 1 C. & M. 109; *aliter*, if the two

Admissible.	*Inadmissible.*
had been held out to an accomplice which might have been communicated to the prisoner.	crimes had been on distinct occasions: R. *v.* Warner, 3 Russ. Cr. 452, *note*).
A. is charged with murder;—A. had, under the expectation of being allowed to turn Queen's evidence against his accomplices, made a confession to a magistrate; but afterwards, refusing to testify against them, had been put upon his own trial. Such a confession has been considered admissible (R. *v.* Dingley, 1 C. & K. 637, *per* Pollock C.B.; Tay. s. 881; R. *v.* Burley, 2 Stark. Ev. (3rd ed.) 13, *note; contra* in R. *v.* McHugh, 7 Cox 483, and R. *v.* Gillis, 17 Ir. C. L. Rep. 512, in which case R. *v.* Burley was explained as deciding merely that the prisoner's breach of condition rendered him liable to be tried and convicted on his own confession, if the latter were legally, but not if it were illegally obtained).	A. is charged with murder. When in custody, a Government hand-bill, offering a pardon to any accomplice who would give information to the police, had been brought to his notice, and induced him to confess. The confession held inadmissible (R. *v.* Boswell, C. & M. 584; R. *v.* Dingley, *sup.;* R. *v.* Blackburn, 6 Cox 333).
	A. gives evidence in a trial induced by a promise from a person in authority that it would not be used against him. Such evidence is not admissible against A. as a confession, though it would be if given in a bankruptcy proceeding (R. *v.* Cherry, 12 Cox 32).
(*c*) In the following cases the *effect of the original inducement was held to have ceased* and the confession to be admissible:—	(*c*) In the following cases the *effect of the original inducement was held not to have ceased* and the confession to be inadmissible:—
A constable having told a prisoner that it would be better to confess, the magistrate on the following morning, before the prisoner made any statement, cautioned him "to say nothing against himself;"—a confession subsequently made held admissible (R. *v.* Lingate, 1 Phil. Ev. 410; R. *v.* Bate, 11 Cox 686). So, where a constable had made a similar remark to the prisoner, and the latter afterwards asked the magistrate if this was so?—to which the magistrate replied that he would not say that it was (R. *v.* Rosier, 1 Phil. Ev. 410).	A constable having told a prisoner that it would be better to confess, the prisoner made a statement, which was afterwards taken down in the constable's deposition and read over to the prisoner in the presence of the magistrate. Before the prisoner had made any answer, the magistrate cautioned him not to say anything to injure himself, as it would be taken down and used against him. The prisoner then said, "What I have stated before is true;"—held, confession inadmissible, as the magistrate, by not cautioning the prisoner that he must not rely on the constable's promise, had impliedly sanctioned it, and the
A magistrate having told a prisoner that if the latter would	

Admissible.

confess he would use his influence to obtain a pardon for him, afterwards received a letter from the Secretary of State refusing the pardon, which letter the magistrate communicated to the prisoner. A confession subsequently made held admissible (R. *v.* Clewes, 4 C. & P. 221; and see R. *v.* Howes, 6 C. & P. 404).

The prosecutor's wife said to the prisoner, "If you do not tell, I will send for a constable in the morning to take you to the magistrate." The prisoner did not then say anything, but next morning being arrested made a confession on his way to the magistrate. Confession held admissible, as the inducement—viz., that the constable would *not* be sent for, and the prisoner would *not* be taken to the magistrate—ceased when these events happened (R. *v.* Richards, 5 C. & P. 318).

Inadmissible.

prisoner might well have believed that the second confession would do him no injury (R. *v.* Smith, cited 3 Rus. Cr. 461; and see R. *v.* Compson, *ibid.* 462. In R. *v.* Horner, 1 Cox 364, however, the contrary was held on identical facts, but R. *v.* Smith was not cited, and no notice was taken by the judge that the original confession had been incorporated in the constable's deposition; see *note* to this case, 3 Russ. Cr. 462).

A constable told a prisoner in the morning that it would be "better to tell the truth"; in the evening another constable cautioned the prisoner that "anything he might say would be used against him." A confession afterwards made held inadmissible (R. *v.* Doherty, 13 Cox 23; *contra*, Tay. s. 878, citing several earlier cases).—A magistrate having told a prisoner that if the latter would confess he would do all he could for him, the prisoner subsequently confessed to a turnkey who did not caution him. Confession held inadmissible (R. *v.* Cooper, 5 C. & P. 525. It would probably have been inadmissible even if the turnkey had cautioned him).

The prosecutor's wife said to the prisoner, "You will be forgiven if you confess"; the prisoner was then taken before a magistrate, but discharged without having confessed. Afterwards she was re-arrested, when the constable said to her in the presence of her mistress, "You are not bound to say anything, but if you do, your mistress will hear you." Confession held inadmissible, as the original inducement might be considered to have been re-sanctioned by the mistress not dissenting from

Admissible.	*Inadmissible.*
	the constable's remark. *Aliter* if the mistress had not been present (R. *v.* Hewitt, 1 C. & M. 534).
(*d*) A. is charged with stealing money from B. The fact that A. after an improper inducement to confess, gave up the money to B., saying, as he did so, that it was the money which had been stolen from him, is admissible (R. *v.* Griffin, R. & R. 151).	(*d*) A. is charged with stealing money from B. The fact that A. after an improper inducement to confess, gave up some of the money to B., saying, as he did so, that it was all he had left of it (R. *v.* Jones, R. & R. 152), or that he had stolen it (2 East P. C. 658), is inadmissible.
A. is charged with burglary. The fact that, after an improper inducement, A. confessed to having thrown a lantern into a pond, and the fact that the lantern was found there, are admissible (R. *v.* Gould, 9 C. & P. 364; R. *v.* Harris, cited Joy, 83; R. *v.* Thurtell, *ibid.* 84. *Aliter* as to other parts of the confession).	A. is charged with theft. The fact that, after an improper inducement, A. confessed to the theft; and the fact that he took a constable to a house where, and to persons to whom he said he had disposed of the property, which persons, however, denied the receipt of the property which was never found, both held inadmissible (R. *v.* Jenkins, R. & R. 492).
(*e*) A. is charged with receiving stolen property. A confession made by the thief to a constable in the presence of and not denied by A., is admissible against the latter (R. *v.* Cox, 1 F. & F. 90, *ante*, p. 150).	(*e*) A. is charged with receiving stolen property. A confession by the thief that he had stolen the goods, is not admissible against A. to prove that fact (R. *v.* Turner, 1 Moo. C. C. 347).
	A. is charged with the murder of B. A death-bed confession made by C. that he, and not A., had murdered B. is inadmissible as evidence of the fact for A. (Gray's case, Ir. Cir. Rep. 76).

CHAPTER XXIII.

STATEMENTS BY DECEASED PERSONS.

THE second main class of exceptions to the hearsay rule consists of the declarations of persons since deceased, which are admissible in proof of the facts declared in the under-mentioned cases, the truth of the declarations being deemed to be *primâ facie* guaranteed by the special conditions of admissibility imposed:

(1) Declarations against interest.
(2) Declarations in the course of duty.
(3) Declarations as to public rights.
(4) Declarations as to pedigree.
(5) Dying declarations in cases of homicide.
(6) Declarations by testators as to their wills.

In (1) and (2) the declarations are admissible generally upon any issue; in (3) to (6) the declarations are only admitted from the necessity of the case, and in proof of the particular issues specified.

Extrinsic Proof.—The death of the declarant and the special conditions of admissibility must be proved *aliunde* to the satisfaction of the judge; though in the case of entries sufficiently ancient and produced from proper custody the death and perhaps the handwriting of the declarant, may be presumed (Wynne *v.* Tyrwhitt, 4 B. & A. 376; Doe *v.* Michael, 17 Q. B. 276).

Competency and Credibility.—Mr. Justice Stephen states that the credit of a deceased declarant may be impeached or confirmed in the same manner as that of a witness who has denied on cross-examination the truth of the matter sug-

gested (art. 135). R. *v.* Drummond, 1 Lea. 338; and R. *v.* Pike, 3 C. & P. 598, in which dying declarations in cases of homicide were excluded because the declarants were incompetent as witnesses, are cited in support, but it is added that the principle would obviously apply to all the cases in question; this, however, seems doubtful, the case of dying declarations being somewhat exceptional. Thus, although incompetency excludes a dying declaration, it does not exclude a declaration against interest (Gleadow *v.* Atkin, 1 C. & M. 410); so, want of personal knowledge would be fatal to the former, but not to the latter (Crease *v.* Barrett, 1 C. M. & R. 919). Again, though proof of previous inconsistent statements is admissible to discredit a witness and has been received in America to impeach a dying declaration (*post*, p. 207), yet such evidence has been rejected when tendered in disparagement of a declaration made in the course of duty (Stapylton *v.* Clough, 2 E. & B. 933, *post*, p. 176, in which case Lord Campbell remarked "what the deceased did in discharging his duty was signing the written entry; what he may babble during the rest of his life on the subject cannot be admitted in evidence, contradicting as it does here what he has before written"). In Stobart *v.* Dryden, 1 M. & W. 615, declarations by a deceased subscribing witness to a deed or will, were held inadmissible to impeach the credit of the declarant's signature; though if fraud is imputed to the deceased, general evidence of character is admissible to re-establish his credit (Tay. s. 1476).

Miscellaneous.—The declarations may be either oral or written; they are not rendered inadmissible by the existence of better evidence of the same facts; and they are receivable either for or against the parties.

CHAPTER XXIV.

DECLARATIONS AGAINST INTEREST.

DECLARATIONS and entries made by deceased persons against their pecuniary and proprietary interests and without any motive to misrepresent, are admissible in proof of the facts stated.

Principle.—The ground of reception is the presumption that what a man states against his interest is probably true.

[Tay. ss. 668–695; Best, s. 500; Ros. N. P. 55–59; Powell, 206–217; Steph. art. 28; 2 Smith L. C. (9th ed.) 348; *note* to Higham *v.* Ridgway; Whart. ss. 226–237].

(1) **The Interest.**[a] — The interest involved must be *pecuniary or proprietary;* no other kind will suffice (Sussex Peerage case, 11 C. & F. 108; R. *v.* Birmingham, 1 B. & S. 763). And the *amount* is immaterial so far as the admissibility of the declaration is concerned (Orrett *v.* Corser, 21 Beav. 52). The declarations also must have been against interest *at the time* they were made; it is not enough that they might possibly turn out to be so afterwards (Smith *v.* Blakey, L. R. 2 Q. B. 326; Massey *v.* Allen 13 Ch. D. 558; *Ex parte* Edwards, *Re* Tollemache, 14 Q. B. D. 415). As to entries *partially* against interest, see p. 169.

Proprietary Interest.—Declarations made by deceased persons in disparagement of their title to land are admissible if made while the declarant was in actual possession of the property and as to matters within his personal knowledge or belief. And as, in the absence of other proof, mere possession implies seisin in fee, any declaration by an occupier tending to cut down, charge, or fetter his presumably absolute interest, will be receivable under this

head. A distinction, however, exists between statements which limit the declarant's *own title*, and those which go to abridge or encumber the *estate* itself; the former being admissible even between strangers, the latter being only so as against the declarant and his privies; see also admissions by predecessors in title, *ante*, p. 131.

Statutes of Limitation.—An acknowledgment made by (or by the direction of) a deceased creditor of money received on account of a debt or interest due to him is receivable as a declaration against interest if made *before*, but *not after*, the debt has become statute-barred (Briggs *v.* Wilson, 5 D. M. & G. 12). Where such an acknowledgment was made after a simple contract remedy, but before a remedy against lands in respect of the same debt, had become barred, the evidence was rejected by North, J., (Newbold *v.* Smith, 29 Ch. D. 877; this case was affirmed, on other grounds, 33 Ch. D. 138, and 14 App. Cas. 423, but no opinion was expressed as to admissibility of the evidence).

If such acknowledgment be *indorsed* upon the instrument itself, this will not be sufficient proof of such payment to defeat the statute, in cases of *simple contract debts* (9 Geo. IV. c. 14, s. 3); though an acknowledgment in any other form may be (Bradley *v.* James, 13 C. B. 822; Steph. art. 28). In the case of *specialty debts* such an indorsement will be sufficient, if it is shown by intrinsic evidence to have been written at the time expressed; though it seems doubtful if it will be presumed to be correct without such proof (Tay. ss. 690–696; Steph. art. 28).

(2) **Personal Knowledge, Competency, Contemporaneousness.**[b]—Declarations against pecuniary interest are admissible, although the declarant had no personal knowledge of the facts stated, but received them merely on hearsay (Crease *v.* Barrett, 1 C. M. & R. 919; Percival *v.* Nanson, 7 Ex. 1; Tay. s. 669; *aliter* as to those against proprietary interest unless the declarant adds his own belief in the hearsay, Trimblestown *v.* Kemmis (9 C. & F. 780); and although he himself would have been incompetent as a witness (Gleadow *v.* Atkin, 1 C. & M. 410); and although they were not made contemporaneously with the facts (Doe *v.* Turford, 3 B. & Ad. 890).—These circumstances affect the weight, not the admissibility, of the declaration.

(3) **Collateral Facts.**[c]—The declarations are evidence

not only of the precise fact against interest, but of all *connected facts* (though not against interest) which are necessary to explain, or are expressly referred to by, the declaration—and whether contained in the same or other documents (Taylor *v.* Witham, 3 Ch. D. 605; Connor *v.* Fitzgerald, *infra*, p. 172). Thus, accounts are admissible some items of which charge the declarant, though other connected items discharge him, or even show a balance in his favour; for it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge, and in the latter case the debit items would still be against interest, since they diminish the balance in his favour (Tay. s. 674).

But *disconnected facts*, though contained in the same document or statement, are inadmissible.

(4) **Extrinsic Proof.**—Extrinsic proof must be given of the declarant's *death* (unless it is presumable from the lapse of time); and that the statement was either *made, written, or signed by him*, or, if made or written by another on his behalf, that it was *authorized or adopted* by the deceased (Lancum *v.* Lovell, 6 C. & P. 437; Bradley *v.* James, 13 C. B. 822; Doe *v.* Hawkins, 2 Q. B. 812). Where, however, the document is thirty years old, and produced from proper custody, the handwriting may generally, if the writing is a private one, be presumed (Tay. ss. 87, 88; 682; Ros. N. P. 139, 140); though this rule has not been acted on in the case of declarations as to pedigree (Fitzwalter Peerage, 10 C. & F. 193; Tay. ss. 1874, 1875); or in those made in the course of duty (Doe *v.* Davies, 10 Q. B. 314; Riggs-Miller *v.* Wheatley, 28 L. R. Ir. 144, where the handwriting of a deceased clergyman to a register more than thirty years old was required to be proved).

Moreover, if the declarant purports to charge himself as the *agent, steward, or receiver* of another, it is generally necessary, in addition, to give some proof that he really occupied the alleged position; except where the agency is a public one, or the entries are ancient, produced from proper custody, and bear strong internal evidence of genuineness (Tay. s. 683).

It is not, however, necessary to give independent evidence of the *existence of the charge* of which the entry shows the subsequent liquidation (Taylor *v.* Witham, *supra*, Tay. s. 675).

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) To prove the execution of a will;—an entry made by a deceased solicitor in his ledger of the payment of his charges for drawing the will and attending its execution, is admissible as a declaration against interest. [*Re* Thomas, 41 L. J. P. & M. 32. And entries of charges would be admissible, it seems, even though they appear to have been paid otherwise than upon the face of the entries: Doe *v.* Robson, 15 East 32.] An entry by a deceased accoucheur of the payment of his charges for attending a confinement in evidence of the date of the child's birth (Higham *v.* Ridgway, 10 East 109), the name of its parents, though only stated on hearsay (Percival *v.* Nanson, 7 Ex. 1, *per* Pollock, C.B.), and of the payment of the charges, though the payer was alive, and might have been called (see Middleton *v.* Melton, 10 B. & C. 317).	(*a*) The question being whether certain jewels, which A. had delivered to his wife "for her use," belonged to her absolutely or only for life;—a revoked codicil made by A. (deceased), reciting that he had given them to her for life, held not to be a declaration which was against A.'s interest (*Re* Bowes, W. N. 1889, 138).
To prove that A. was illegitimate;—a statement by him that he was so, held receivable after his death as a declaration both against pecuniary and proprietary interest (*per* Chitty, J., *Re* Perton, 58 L. T. 706).	To prove that certain shares belonged to A.;—an entry in the day-book of a deceased stockbroker—"Bought for A. 200 L. C. Co.'s shares, £1400;"—held not admissible as a declaration against the broker's interest; for if the price fell, and he was not bound to deliver any specific shares, the transaction might be for his advantage (Massy *v.* Allen, 13 Ch. D. 558. A corresponding entry in the broker's ledger in which the latter, in addition, debited himself with the purchase-money received from A., was admitted).
	To prove the marriage of A. and B.;—a statement by a deceased clergyman that he had performed the ceremony, the circumstances being such as to render him liable to a criminal prosecution, held inadmissible, not being against "pecuniary or proprietary interest" (Sussex Peerage case, 11 C. & F. 108).
To prove that A. was the owner of certain goods;—a bill of lading by which they were consigned to A., signed by the	To prove the terms on which A. sent goods to B;—a letter written to B. by his deceased manager, stating that A. had

Admissible.

deceased master of a vessel, is adducible as a declaration against the master's interest (Haddow *v.* Parry, 3 Taunt. 303. *Aliter* if the cases had been marked "contents unknown." So a letter acknowledging the receipt of a will has been held evidence that the testator sent the will to the writer (Pryke *v.* Crouch, 1 Ld. Raym. 730).

To prove the payment of rent by A. to B.;—a statement made by B.'s deceased agent when handing B. a sum of money that he had received it from A. as rent, held admissible as against interest [Bewley *v.* Atkinson, 13 Ch. D. (C. A.) 283 The same point was discussed, but not decided in Fursden *v.* Clogg, 10 M. & W. 572; but see opposite. A statement of the receipt of money, and of its payment over to a person who could not give a valid discharge, was held admissible in Orrett *v.* Corser, 21 Beav. 52].

To prove the existence and terms of a lease;—an entry made in a rent-book by a deceased landlord that he had "agreed to grant a lease for thirty-one years at £96 rent, and accept the old rent (£84) for one

Inadmissible.

sent the goods to the office on the terms in question, is not admissible;—the possible liability of B.'s manager to an action for damages in case the goods were lost, being too remote a pecuniary detriment (Smith *v.* Blakey, L. R. 2 Q. B. 326). So, the certificate of a deceased auditor is not admissible to prove an account, on the ground of his liability to an action of negligence if the account turned out incorrect (Vivian *v.* Mouat, 40 L. T. 210).

To prove a debt due from a deceased bankrupt;—an admission of the debt in the bankrupt's statement of affairs, is not admissible as a declaration against interest, on the ground that there might turn out to be a surplus after payment of the creditors, which would be diminished by the amount of the debt admitted (*Ex parte* Edwardes, *Re* Tollemache, 14 Q. B. D. 415).

To prove the payment of interest by A. to B.;—a letter written by A.'s former attorney (deceased) to B., stating that he (the attorney) had paid to B.'s account a sum of money which he had received from A. as interest;—held, not admissible as a statement against interest (Newbould *v.* Smith, 33 Ch. D. (C. A.) 138; affirmed on other grounds, 14 App. Cas. 423).

To prove a contract by A. to hire B. as a servant;—an entry in the diary of A. (deceased) as follows: "April 4th.—B. came as a servant; to have for the half year £2;" is not admissible as a statement against A.'s in-

Admissible.

year in consequence of the potato famine;"—held admissible as against *pecuniary* interest because of the abatement of the first year's rent, although the entry proved an increase in the new rent; and admissible against *proprietary* interest because the agreement to grant a lease tended to fetter the landlord's absolute right of ownership (Connor *v.* Fitzgerald, 11 L. R. Ir. Ch. 106).

To prove that A. owned certain land;—a statement of that fact made by B. (deceased) while felling timber on the land, is admissible; the act being a sufficient assertion of ownership to imply seisin in B., and so to admit his declarations in derogation of title (Doe *v.* Arkwright, 5 C. & P. 575). So, a statement by a deceased occupier that he managed the land for A. (De Bode's case, 8 Q. B. 208); or, paid rent to him for it (R. *v.* Birmingham, 1 B. & S. 763), is admissible to prove either fact.

To prove that A. had granted a renewable lease to B. of certain lands, a covenant contained in a sub-lease by B. to C. of the same lands, whereby B. undertook to obtain a renewal of A.'s lease to him, is admissible after B.'s death as secondary evidence of A.'s lease. The fact that B. granted C. a lease is also evidence of an act of ownership sufficient to show that B. was in possession at the time (La Touche *v.* Hutton, 9 Ir. Eq. 166).

A statement by a deceased occupier of land that he held a life-estate in it under a particular will, of which C. and B. were executors;—is admissible to prove the existence and execu-

Inadmissible.

terest, being merely a memorandum of an agreement which could not be presumed to be prejudicial to either party [R. *v.* Worth, 4 Q. B. 132. Nor to prove the terms upon which horses were hired from a jobmaster, is an entry by his deceased servant of such terms admissible as a statement against the servant's interest: Calvert *v.* Canterbury, 2 Esp. 646].

To prove that a certain spot was not within the waste of a manor;—a declaration by a deceased lord that "he was entitled to the waste up to a certain point (which did not include the *locus in quo*), but no further," is inadmissible—(1) the lord not being in possession of the *locus;* (2) as not being against proprietary interest, because, though disclaiming as to one part, he affirmed as to the other (see, however, as to debtor and creditor accounts, *ante*, p. 169). [Crease *v.* Barrett, 1 C. M. & R. 919.]

A declaration by a deceased occupier of land as to what he had *heard another person state* respecting the ownership is not admissible as against proprietary interest (Trimblestown *v.* Kemmis, 9 C. & F. 780; *aliter* if he adds that he believes the statement to be true).

The question being whether a right of common existed over a field;—a statement by a deceased lessee of the field that the right did or did not exist, is not admissible against either the owner of the field or strangers, though *aliter* against the declarant's successors in title [Papendick *v.* Bridgewater, 5 E. & B. 166; R. *v.* Bliss, 7 A. & E. 550]. So, a declaration

Admissible.

tors of the will, being against proprietary interest on account of its twofold limitation of the declarant's estate to a life-interest, and under a particular document (Sly *v.* Sly, 2 P. D. 91; Flood *v.* Russell, 29 L. R. I. 91). So, with declarations by a deceased devisee that she was merely a trustee (Strode *v.* Winchester, 3 Dick. 397).

On a question of title to land;—the fact that A. (deceased) accepted an allotment of less of the land than he was *primâ facie* entitled to, is receivable, even against strangers, as an admission against proprietary interest [Gery *v.* Redman, 1 Q. B. D. 161. This is an extension of the exception to the *acts* of deceased persons against interest].

(*b*) To prove the payment of rent by B., C., and D. to A.;—an entry by A.'s deceased steward of the receipt of money from B., "as rent both from himself and C. and D.," is admissible, although the payments by C. and D. rested merely on hearsay from B. (Percival *v.* Nanson, 7 Ex. 1).

(*c*) To prove a loan of money by A. to B.;—an entry by A. (deceased), "B. paid me three months' interest," followed by other entries connected therewith, and pointing to such a loan, are admissible, though forming the only evidence of the loan (Taylor *v.* Witham, 3 Ch. D. 605; Davies *v.* Humphreys, 6 M. & W. 153).

To prove that A. had tendered and B. refused £100;—two entries by a deceased clerk of A.'s solicitor made in a day-book, the first charging himself with the receipt of £100 from his master "to tender to B.;" the second stating the tender of

Inadmissible.

by a deceased tenant for life as to the boundary of the estate is inadmissible against the remainderman (Howe *v.* Malkin, 40 L. T. 196).

The question being whether land which A. had conveyed to C., had been bought by A. as trustee for B.;—a statement made by A. (deceased) after the conveyance that he had received the purchase-money from B., held inadmisible, (1) as in derogation of his own grant; (2) as made after parting with his interest (Lalor *v.* Lalor, 4 L. R. I. 678; *ante*, p. 133).

(*c*) An account kept by the deceased steward of A., on one side of which the steward debited himself with rents received for A., but on the opposite side credited himself with certain disbursements and the tenants with certain allowances;—held, inadmissible to prove the disbursements and allowances, the debit and credit items not being connected together by any specific reference [Doe *v.* Beviss, 7 C. B. 456; Knight *v.* Waterford, 4 Y. & Coll. 293]. So, a debtor and creditor account, in which a balance is struck in favour of the deceased declarant, but in which the

Admissible.	*Inadmissible.*
£100 to B. and B.'s refusal of it, are admissible, the second being connected with the first, as explanatory of it (Marks *v.* Lahee, 3 Bing. N. C. 408).	credit items are not otherwise connected with the debit items, is inadmissible [Whaley *v.* Carlisle, 15 W. R. 1183, 17 Ir. C. L. Rep. 792; *aliter* as to other items showing how the total of the debit amounts is made up. Compare *ante*, p. 124, and examples].
To prove a customary payment by a certain part of a parish;—two entries on the same page of a parish book, signed by deceased churchwardens, as follow, are admissible:	
(1) "It is our ancient custom thus to apportion church-lay. The chapelry of Haworth to pay one-fifth," &c.	
(2) "Received of Haworth, who this year disputed this our ancient custom, but after we had sued him, paid it accordingly—£8 and £1 for costs" [Stead *v.* Heaton, 4 T. R. 669. So, old unsigned accounts found in the same box and contemporaneous with a signed account, charging the party signing, are admissible, the sums received being the same in both: Musgrave *v.* Emmerson, 10 Q. B. 326].	
(*d*) To prove the payment of rent by a tenant to a landlord;—a rent account delivered by a deceased steward of the landlord at an audit, is admissible, as having been adopted by the steward, though he neither wrote nor signed it (Doe *v.* Hawkins, 2 Q. B. 812).	(*d*) To prove the terms of a tenancy;—entries in the rent-books of a deceased steward, wherein he was debited with the rents received, the entries being in the handwriting of a person (also deceased) who styled himself "clerk to the steward," held inadmissible as declarations against the steward's interest, in the absence of extrinsic proof that the clerk was employed by him to make the entries; and inadmissible as against the clerk's interest, as they did not purport to charge the clerk [De Rutzen *v.* Farr, 4 A. & E. 53; and see Bright *v.* Legerton, 3 L. T. N. S. 713, as to proof of solicitor's employment by client].

CHAPTER XXV.

DECLARATIONS IN THE COURSE OF DUTY.

DECLARATIONS and entries made by deceased persons in the ordinary course of duty, contemporaneously with the facts stated and without motive to misrepresent, are admissible in proof of their contents.

Principle.—The ground of reception is the presumption of truth which arises from the mechanical and generally disinterested nature of such entries, and from their constant liability, if false, to be detected by the declarant's superiors.

[Tay. ss. 697–713; Best, s. 501; Ros. N. P. 60–62; Powell, 218–228; Steph. art. 27; 1 Smith L. C. (9th ed.) 352, note to Price *v.* Torrington; Whart. ss. 238–257.]

(1) **The Duty.**[a]—The declarations must have been made in the discharge of a duty to a *third person;* a mere personal custom, not involving responsibility, is insufficient (R. *v.* Worth, 4 Q. B. 132; Massey *v.* Allen, 13 Ch. D. 558). The duty must not be a general one, involving a variety of acts that may change from time to time, but *specific and twofold—i.e.*, to do a particular act and to record or report it when done (Smith *v.* Blakey, L. R. 2 Q. B. 326; Sturla *v.* Freccia, 5 App. Cas. 623; Lyell *v.* Kennedy, 56 L. T. 647, reversed on other grounds, 14 App. Cas. 437). The *acts must have been done by the declarant,* and not by third persons [Smith *v.* Blakey, *supra;* Polini *v.* Gray, 12 Ch. D. (C. A.) 411 (where, however, James L.J., said, "the entry must relate not to something said, learned, or ascertained by the declarant, but to something done *by*, or *to*, him"), affirmed *sub nom.*, Sturla *v.* Freccia, *supra;* The Henry Coxon, 3 P. D. 156]. It seems doubtful whether declara-

tions as to *acts to be done* are admissible: they were received in R. *v.* Buckley, 13 Cox 293, but rejected in Rowlands *v.* De Vecchi, 1 C. & E. 10, and the principle of the above cases would seem to exclude future acts. It must have been the declarant's duty to make (or cause to be made: Brain *v.* Preece, 11 M. & W. 773; R. *v.* St. Mary, Warwick, 22 L. J. M. C. 109) the *whole of the entry* or record (Trotter *v.* McLean, 13 Ch. D. 574).

(2) **Contemporaneousness.**[b] — The declarations must have been made contemporaneously with the facts recorded (Doe *v.* Turford, 3 B. & Ad. 890; Smith *v.* Blakey, *supra*; Sturla *v.* Freccia, *supra*; The Henry Coxon, *supra*; Ryan *v.* King, 25 L. R. Ir. 184); which term, however, is not to be here construed in the strict sense applicable to declarations that are a part of the *res gestæ*; or in the loose sense applicable either to entries in public registers, or to memoranda admitted to refresh the memory of a witness. The entry should be made at or near the time of the act—a record in the evening of an act done the same morning has been received (Price *v.* Torrington, 1 Salk. 285); while an interval of two days has sufficed to exclude (The Henry Coxon, *supra*).

(3) **Collateral Facts, Personal Knowledge, Contradiction.**[c]—The declarations are only evidence of the precise facts that it was the writer's duty to record, and of which consequently he had personal knowledge; and not of other matters which, though contained in the same statement, were merely collateral (Chambers *v.* Bernasconi, 1 C. M. & R. 347; Brain *v.* Preece, 11 M. & W. 773; Smith *v.* Blakey, *supra*; Sturla *v.* Freccia, *supra*; The Henry Coxon, *supra*; Ryan *v.* King, *supra*).

The entries cannot be contradicted or explained by subsequent declarations (Stapylton *v.* Clough, 2 E. & B. 933).

(4) **Extrinsic Proof.**—Extrinsic proof must be given of the declarant's *death*, *handwriting* (*ante*, p. 169), *official character* (though where the office is public, proof of acting therein is sufficient: Bright *v.* Legerton, 3 L. T. N. S. 713), and *duty* [*supra*, p. 175; Lyell *v.* Kennedy, 56 L. T. 647, *per* C. A.; Riggs-Miller *v.* Wheatley, 28 L. R. Ir. 144; as to the duty being presumed, see Sly *v.* Sly, 2 P. D. 91]. *Contemporaneousness* must also be established independently, unless it can be presumed from the circumstances of the

case (Tay. s. 704; East Union Ry. *v.* Symonds, 5 Ex. 237; Esch *v.* Nelson, 1 Times L. R. 610).

Note.—Declarations in the course of duty differ, as we have seen, from those against interest in requiring contemporaneousness, personal knowledge, and the exclusion of collateral matters.

EXAMPLES.

Admissible.

(*a*) To prove that A. executed a deed at a certain time and place;—an entry made by a deceased solicitor in his diary of his having attended A. on his executing the deed at that time and place, is admissible. [Rawlings *v.* Rickards, 28 Beav. 370; Dundonald Peerage Case, cited 1 S. L. C. (9th ed.) 358; Esch *v.* Nelson, 1 Times L. R. 610, *per* Coleridge, C.J. — An entry in a *Diary* may be presumed contemporaneous: *id.*]

To prove that A. delivered certain beer to B.;—an entry of the delivery made in A.'s books at night by his drayman (deceased), whose duty it was to deliver the beer during the day, and afterwards to make the entry, is admissible (Price *v.* Torrington, 1 Salk. 285).—So of entries by the deceased clerk of a notary to prove presentment and dishonour of a bill (Sutton *v.* Gregory, 2 Pea. N. P. 150; Poole *v.* Dicas, 1 Bing. N. C. 649; and of the deceased clerk of a rate collector to prove payment of rates (R. *v.* St. Mary, Warwick, 22 L. J. M. C. 109).

Inadmissible.

(*a*) To prove the terms on which A., a farmer, hired B., a labourer;—a memorandum of the transaction, made at the time by A. (deceased) in his own books, and according to his usual custom, is inadmissible, there being merely a practice and not a duty to make the entries (R. *v.* Worth, 4 Q. B. 132).

To prove the purchase of shares for a client;—an entry made by a deceased stock-broker in his day-book that he had bought the shares for the client, is inadmissible, there being no duty to make the entries (Massy *v.* Allen, 13 Ch. D. 558).

To prove the terms on which A. sent goods to B.;—a letter, stating the terms, and written by the deceased manager of the branch at which the goods were received, in pursuance of a duty to keep his principal informed of all business done at that branch, is not admissible, the manager's duty being a general and not a specific one (Smith v. Blakey, L. R. 2 Q. B. 326; and see for a similar case Turner *v.* Hutchinson, 3 L. T. N. S 815).

To prove the items of an account;—the certificate of a deceased solicitor, whose duty it was merely to check the arithmetic of the account without testing its accuracy with

Admissible.

To prove the baptism and marriage of A.;—entries made in old Irish chapel-books by a deceased Roman Catholic priest, who had performed the ceremonies (Malone *v.* Lestrange, 2 Ir. Eq. R. 16; O'Connor *v.* Malone, 6 C. & F. 572, 576; and see Ryan *v.* King, 25 L. R. Ir. 184); or entries in old parish registers before the Irish Marriage Act, made by a deceased Protestant clergyman (Riggs-Miller *v.* Wheatley, 28 L. R. Ir. 144) are receivable. In the last case the evidence was only excluded by a majority of the Court from the insufficiency of the extrinsic proof; as to which see also Lyell *v.* Kennedy, 56 L. T. 647, *per* C. A. (reversed on other grounds 14 App. Cas. 437). Both classes of entries would be inadmissible as parish registers (see *post*, p. 223). Mr. Justice Stephen cites R. *v.* Clapham, 4 C. & P. 29, as an illustration under this head, but the entry there, which was in an English parish register,

Inadmissible.

the vouchers, held inadmissible (Vivian *v.* Mouat, 44 L. T. 210).

The question being which of two ships was to blame for a collision occurring on a certain Saturday;—an entry of the circumstances of the collision made by a deceased mate in the ship's log on the following Monday—held inadmissible—(1) The acts recorded having been done by third persons and not by the deceased; (2) the entries not being contemporaneous; and (3) it being in the interest of the declarant to represent the collision as occurring through the fault of the other ship (*The Henry Coxon*, 3 P. D. 156).

To prove a marriage solemnised in Ireland in 1842 (before the Irish Marriage Act) in the private house of a Protestant clergyman;—an entry made by him in a register which he kept of such private marriages, held inadmissible (Stockbridge *v.* Quicke, 3 C. & K. 305, per Parke, B. No reasons are given, but it is to be observed that the entry was not made in the ordinary parish register. This case was doubted by O'Brien, J., in Riggs-Miller *v.* Wheatley, *sup.* Baron Parke in the former case admitted a certificate of the same marriage as being a "part of the transaction;" a ground which seems unsatisfactory, as in no other case has a certificate been so received [*post*, Certificates. A certificate of marriage (not tendered as secondary evidence of the register) was rejected in Nokes *v.* Milward, 2 Add. 386; so also in Farrell *v.* Maguire, 3 Ir. L. R. 187, where, however, the ceremony had been per-

Admissible.	*Inadmissible.*
seems to have been admitted as a public document, and not as a declaration by a deceased clergyman in the course of duty.	formed some years before and in a neighbouring parish]. The question being as to the age of A. (a Jew), and a custom being proved to perform circumcision eight days after birth;—an entry made in course of duty by a deceased Chief Rabbi in the books of the synagogue that he had circumcised A. eight days after his birth, held inadmissible (Davis *v.* Lloyd, 1 C. & K. 275, *sed qu.* No reasons are given; possibly because the duty was not one known to the law. This case is doubted by Mr. Taylor, s. 701, and by O'Brien, J., in Riggs-Miller *v.* Wheatley, *sup.*). To prove the marriage of a fellow of a college;—*un*signed entries relating to the marriage, and made in the college books by a deceased registrar, whose duty it was to make and *sign* the entries, were rejected, although in the same handwriting as the signed ones (Fox *v.* Bearblock, 17 Ch. D. 429; and see Lancum *v.* Lovell, 6 C. & P. 437; *aliter* if there were no usage to sign them, Lauderdale Peerage, 10 App. Cas. 692).
To prove the contents and posting of a letter, not produced on notice; a copy bearing an indorsement that the original had been posted, and made in the handwriting of a merchant's clerk (deceased), whose duty it was to copy and post all letters, is admissible as secondary evidence (Pritt *v.* Fairclough, 3 Camp. 305; Hagedorn *v.* Reid, *id.* 379; Rowlands *v.* De Vecchi, *infra*).—So, an old copy of a lost will produced from proper custody, and made presumably in the course of duty by a clerk (deceased) of the solicitor to the executor to the will is similarly admissible	To prove the contents of a lost deed, executed in 1570:—An entry, stating the substance of the deed, and made in 1610, in the books of a deceased steward of the property to which the deed related, is inadmissible, not being contemporaneous, and it not appearing to be part of the steward's duty to make the entry (Doe *v.* Wittcomb, 6 Ex. 601; 4 H. L. C. 425; Doe *v.* Skinner, 3 Ex. 84).—So a copy of a deed made by a deceased solicitor at the time of sending the deed away as a precaution in case of its loss. [Kerin *v.* Davoren, 12 Ir. Ch. R. 352. In the above cases, the copies

Admissible.

(Sly *v.* Sly, 2 P. D. 91). So, perhaps, an abstract of title, made at the time of a sale, and in the course of business, is secondary evidence of the deeds recited (Doe *v.* Wittcomb, 6 Ex. 601). As to drafts of lost deeds, see Waldy *v.* Gray, L. R. 20 Eq. 238.

To prove service of a notice to quit on A.'s tenant;—an indorsement of the fact and time of service made on a duplicate notice by a deceased *clerk* of A.'s solicitor, whose duty it was to serve the notice, is admissible (Stapylton *v.* Clough, 2 E. & B. 933).—So, a similar indorsement made by a deceased *solicitor*, stating that he himself had served the notice is admissible, the solicitor being under a duty to his client, and the presumption being that the principal would observe the rules of the office as well as the clerks (Doe *v.* Turford, 3 B. & Ad. 890).

The question being whether A. murdered B., a policeman, at a certain time and place;—a verbal report made by B. in the course of duty, to his inspector, that he was *about to go* to that place at that time, in order to watch A.'s movements, held admissible (R. *v.* Buckley, 13 Cox 293).

(*b*) See Price *v.* Torrington, 1 Salk. 285, cited *ante*, p. 177.

Inadmissible.

were produced from proper custody.]

To prove the posting of a letter;—an entry as to the letter made by a deceased clerk in a book wherein it was his duty to enter all letters *to be* posted, held inadmissible (Rowlands *v.* De Vecchi, 1 C. & E. 10; *aliter* if the duty had been to enter the letters *after* postage).

(*b*) See The Henry Coxon, 3 P. D. 156; Farrell *v.* Maguire, 3 Ir. L. R. 187; and Ryan *v.* King, *infra*.

(*c*) The question being whether A. was arrested in a certain parish;—a certificate annexed to the writ by a deceased sheriff's officer stating the fact, time, and place of the arrest, returned by him to the sheriff, held inadmissible, on the ground that the duty merely required the fact and time, but not the place, of the arrest to be returned (Chambers *v.* Bernasconi, 1 C. M. & R. 347. Although

Admissible.

Inadmissible.

the principle of this decision, *i.e.*, that such declarations are only evidence of facts which it is the writer's duty to record, and not of incidental matters, is now established, yet its stringent application in the above case has been frequently criticised).

The question being whether A. and B. were married; an entry in a baptismal register made by a Roman Catholic parish priest (deceased), and recording the baptism of C. as "the child of A. and B.," is not admissible, as the entry was not contemporaneous with the marriage, which was a collateral fact, and one of which the writer had no personal knowledge (Ryan *v.* King, 25 L. R. Ir. 184; see also Sturla *v.* Freccia, 5 App. Cas. 623, where the duty of a government committee being to report as to the fitness of A. for the post of consul, a statement of the date and place of A.'s birth, and other details of his personal history was rejected, as the statement of these facts was not necessary to the performance of the duty. The report was also held inadmissible as a public document, *post*, p. 237).

To prove the delivery of certain coal;—the duty being for the workman who delivered it to give an account at the end of the day of all coal delivered during the day, to a foreman (deceased) who, being unable to write, got the entries made for him by a clerk;—an entry so made held inadmissible, for though made by the direction of the foreman, yet the latter had no personal knowledge of the deliveries (Brain *v.* Preece, 11 M. & W. 773).

The question being whether a certain notice to quit had been properly served, and an entry of its service having been made by a

Admissible.	*Inadmissible.*
	deceased clerk (see Stapylton *v.* Clough, *ante*, p. 180), proof of a subsequent oral declaration by A. that he had served it on the wrong person, held inadmissible (*id.*).

CHAPTER XXVI.

DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS.

DECLARATIONS made by deceased persons of competent knowledge, *ante litem motam*, are admissible in proof of ancient rights of a public or general nature.

Principle.—The grounds of admission are *necessity*;—ancient facts being generally incapable of direct proof; and the guarantee of truth afforded by the *public nature of the rights*, which tends to preclude individual bias, and to render misstatements difficult by exposing them to constant contradiction.

Evidence of this description is frequently included under the general term *Reputation* (Stark. Ev. 189 *n.*); and is admissible for or against the Crown as well as an ordinary party (A.-G. *v.* Emerson, 5 T. L. R. 109; L. R. 1891, A. C. 649).

[Tay. ss. 607–634; Best, s. 497; Ros. N.P. 48–51; Powell, 164–178; Steph. art. 30; Whart. ss. 185 200.]

(1) **What are matters of Public and General Interest.**[a]—The right or interest involved must be of a pecuniary or proprietary nature (R. *v.* Bedfordshire, 4 E. & B. 535; see *ante*, Declarations against Interest).

Public Rights are those common to all members of the State—*e.g.*, rights of highway and ferry, or of fishery in tidal rivers.

General Rights are those affecting any considerable section of the community—*e.g.*, questions as to the boundaries of a parish or manor.

Declarations by deceased persons as to *private rights* are inadmissible, since these are not likely to be so commonly or correctly known, and are more liable to be misrepresented. Where, however, the question is, whether a

right is public or private (R. *v.* Bliss, 7 A. & E. 550); or the private right is identical with a public one (Thomas *v.* Jenkins, 6 A. & E. 525), such declarations are receivable.

(2) **Competent Knowledge.**[b]—In the case of *general rights*, the declarants must have possessed competent knowledge, which may either be shown extrinsically (*e.g.*, by proof of residence in, or other connection with, the locality); or presumed from the circumstances under which the declarations were made (Freeman *v.* Phillipps, 4 M. & S. 486).

In the case of *public rights*, however, all being concerned are presumed competent; so that the absence of peculiar means of knowledge goes, strictly speaking, to weight and not admissibility.

(3) **Lis Mota and Interest.**[c]—The declarations must, in order to prevent bias, have been made *ante litem motam* —*i.e.*, before the commencement of any controversy (legal or actual) involving the same subject-matter.

Declarations made after such a dispute has arisen are inadmissible, although the dispute was *unknown* to the declarant;—for that is a collateral issue which it might be impossible to prove (Berkeley Peerage Case, 4 Camp. 417; Shedden *v.* Att.-Gen. 30 L. J. P. & M. 217); or was *fraudulently commenced* with a view of excluding the declarations (Shedden *v.* Att.-Gen., *supra*); or involved *different parties or related to different property* or claims (Tay. s. 633).

On the other hand, declarations as to the right will be received although made for the express purpose of *preventing future disputes* (Berkeley Peerage Case, *supra;* Monkton *v.* Att.-Gen., 2 R. & M. 147; Brisco *v.* Lomax, 8 A. & E. 198; Shedden *v.* Att.-Gen., *supra*); or after a *claim had been asserted but finally abandoned* (Hubb. Ev. of Suc. 668); or after the existence of *non-contentious legal proceedings* involving the same right (Brisco *v.* Lomax, *supra;* Gee *v.* Ward, 7 E. & B. 509); or after the existence of *contentious legal proceedings* involving the same right only *collaterally* and not directly (Freeman *v.* Phillipps, *supra*).

Interest.—Declarations made in direct support of a claim contemplated to be brought by the declarant, or otherwise obviously to subserve his own interest, will be rejected (see *post*, Declarations as to Pedigree); but if no dispute has arisen, or claim been contemplated, the fact that the decla-

rations tend to support his own title; or that the declarant stood, or believed he stood, in *pari jure* with the party relying on them, affects only their weight and not their admissibility (Doe *v.* Davies, 10 Q. B. 314; Dunraven *v.* Llewellyn, 15 Q. B. 791).

(4) **Particular Facts.**[d] **Corroboration.**—The declarations must relate to the general right, and not to particular facts which support or negative it;—for the latter, not being equally notorious, are liable to be misrepresented or misunderstood, and may have been connected with other facts which, if known, would qualify or explain them.

Declarations have been received, however, which not only directly negative a general right, but which indirectly do so—*e.g.*, by setting up an inconsistent private claim, or by omitting all mention of it where mention might reasonably be expected (Tay. s. 620).

Corroboration.—It is not essential to the admissibility, though it is to the weight, of the declarations, that they should be corroborated by proof of the exercise of the right within living memory (Crease *v.* Barrett, 1 C. M. & R. 919).

(5) **Form of the Declarations.**[e]—The following are some of the principal forms in which evidence of this nature may be tendered:—

Oral Statements by deceased persons as to the existence or non-existence of the right (*e.g.*, statements by perambulators, which, provided they are not confined to particular facts, are evidence either of reputation or as declarations accompanying the exercise of a right, Tay. s. 618; though it is otherwise with entries in parish books recording the fact that perambulations have taken a particular line, Taylor *v.* Devey, 7 A. & E. 409); or their *depositions* in old suits in which the same right was incidentally, but not directly, involved (Freeman *v.* Phillipps, 4 M. & S. 486).

Old Deeds, Leases, &c., reciting or describing the public right or matter (Brett *v.* Beales, M. & M. 416; Curzon *v.* Lomax, 5 Esp. 60; Plaxton *v.* Dare, 10 B. & C. 17). Mere *copies and abstracts* of such deeds are not generally so receivable, the contents of a document being in the nature of a particular fact, and not provable by reputation (Doe *v.* Wittcomb, 6 Ex. 601, 4 H. L. C. 425). When, however, the existence and loss of the originals have been proved,

such copies, if produced from proper custody, may be admissible as secondary evidence (*id.*); thus, a Bishop's register of chapter leases has been received as evidence of reputation respecting the limits of a parish (Coombs *v.* Coether, M. & M. 398, Ros. N. P. 214; *post*, p. 223). Whether *Private Acts* are admissible as reputation on questions of public right seems doubtful. They were received in Curzon *v.* Lomax, 5 Esp. 60, and in Carnarvon *v.* Villebois, 13 M. & W. 313 (though in that case their reception might have been supported on the footing of admissions by parties or privies), but rejected in Beaufort *v.* Smith, 4 Ex. 450; see Ros. N. P. 188; and *post*, p. 214.

Maps, Surveys, and Assessments.—Private Maps are evidence of reputation if made by (or under the direction, or from the information, of) deceased persons of competent knowledge (Hammond *v.* Bradstreet, 10 Ex. 390; R. *v.* Milton, 1 C. & K. 58); or if they have been recognised or used by such persons for the purpose of defining the general right and not merely particular matters (Pipe *v.* Fulcher, 28 L. J. Q. B. 12; and see Daniel *v.* Wilkin, 7 Ex. 429). So, a map made under a private Inclosure Act is admissible providing the Act itself be proved (R. *v.* Milton, *supra*). *Ancient public surveys* are also receivable as reputation if made under competent authority (Freeman *v.* Reed, 4 B. & S. 174; Smith *v.* Brownlow, L. R. 9 Eq. 241, 2 Eagle on Tithes, 402–403; and *post*, Public Documents); or by persons of competent knowledge (Daniel *v.* Wilkin, *supra*). *Modern public surveys*, though compiled under statutory authority and to some extent from competent information have, however, been rejected (Bidder *v.* Bridges, 34 W. R. 514; 54 L. T. 529, affirmed W. N. 1886, p. 148; *post*, Public Documents). *Ancient public assessments* (*e.g.*, the taxation of Pope Nicholas) are admissible on the same footing (see Eagle on Tithes, *supra*, as to these and similar documents). And an old churchwarden's assessment is evidence of reputation that the land is within the parish (Plaxton *v.* Dare, 10 B. & C. 17); as are entries in old Vestry Books, provided they do not relate to private or particular facts (Cooke *v.* Banks, 2 C. & P. 478; and see *post*, p. 225); so, the books of a deceased steward of a manor showing fines assessed are evidence of a custom to take such fines, at least, if coupled with some evidence of their payment (Ely *v.* Caldecott, 7 Bing. 433).

Manor Books and Presentments: Court Rolls (provable either by production of the original, or by copy) as well as acts of ownership done under them are evidence of reputation (Tay. s. 623; R. N. P. 119, 208–210; A.-G. *v.* Emerson, 5 T. L. R. 109; L. R. 1891, A. C. 649); so, the draft of a surrender, though no entry appeared on the roll (Doe *v.* Calloway, 6 B. & C. 484); and even an unsigned custumal, not properly a Court Roll, but preserved therewith and purporting to be made with the assent of the tenants (Denn *v.* Spray, 1 T. R. 466). So, presentments by a manor jury as to matters within their jurisdiction (Roe *v.* Parker, 5 T. R. 26; Evans *v.* Rees, 10 A. & E. 151; Richards *v.* Bassett, 10 B. & C. 657); as well as the depositions of manor tenants (if not relating to particular facts) taken in an authorized inquiry (Crease *v.* Barrett, 1 C. M. & R. 919). As to manor assessments, see Ely *v.* Caldecott, *supra.*

Verdicts, Judgments and Awards.—When juries were summoned *de vicineto*, their verdicts were properly evidence of reputation; but at the present day neither verdicts nor judgments can strictly be so classed. Whether admissible as in the nature of reputation, or as amounting to acts done in the exercise of a right (see Acts of Ownership, *ante*, p. 50), however, the rule is now established that on questions of public or general interest, the verdict, judgment, or order, even *inter alios*, of a competent tribunal (whether Superior Court; Duchy, Manor, or Survey Court, see p. 231; or Statutory Commission), is admissible, not however as evidence of any particular fact, but as an adjudication upon the state of facts and question of usage at the time (Pim *v.* Currell, 6 M. & W. 266; Neill *v.* Duke of Devonshire, 8 App. Cas. 147; Tay. ss. 624–637; *post*, Judgments).

It does not affect the admissibility (though it may the weight) of a verdict when tendered under this head, that it was not succeeded by judgment; or of a judgment, that it went by default (Neill *v.* Duke of Devonshire, *supra*); or was recent (Carnarvon *v.* Villebois, 13 M. & W. 313); or not followed by execution or satisfaction (*ibid.*; Tay. s. 624). And verdicts and judgments standing upon a different footing from ordinary declarations, depositions and entries by private persons, the conditions as to death and *lis mota* do not, and indeed cannot, apply to them (Greenleaf, s. 139; Stark. Ev. 190, note *c*; Carnarvon *v.* Villebois,

supra; R. *v.* Brightside, 13 Q. B. 933; Rogers *v.* Wood, 2 B. & A. 245; Brisco *v.* Lomax, 8 A. & E. 198; Reed *v.* Jackson, 1 East 355).

Such judgments, however, must not be *interlocutory* (Pim *v.* Currell, *supra*); or *collusive* (Neill *v.* Duke of Devonshire, *supra*); and mere *awards* have, for no very intelligible reason, been altogether rejected as evidence of reputation (Evans *v.* Rees, 10 A. & E. 151).

Claims not followed by verdict or judgment are not admissible as evidence of reputation (Lancum *v.* Lovell 6 C. & P. 437; Duke of Devonshire *v.* O'Neill, 2 L. R. Ir. 132, 165, *per* Palles, C. B.); though they may be as acts of ownership (*ante*, p. 50). Thus, old Bills and Answers in Chancery have been admitted on the latter ground to show claims made to a public right and abandoned (Malcolmson *v.* O'Dea, 10 H. L. C. 593; Riggs-Miller *v.* Wheatley, 28 L. R. Ir. 14); and an indictment for non-repair of a highway is similarly admissible, whether submitted to or prosecuted to conviction (R. *v.* Brightside, 13 Q. B. 933).

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) The following have been held to be matters of *public or general interest*:—	(*a*) The following have been held to be matters of a *private nature*:—
Questions as to the boundaries of a county, town, parish, manor, or hamlet (Nicholls *v.* Parker, 14 East 331 *n.*).	Questions as to the boundaries of two private estates (Clothier *v.* Chapman, 14 East 331 *n.*); or of a waste over which some tenants only of a manor claimed a right of common (Dunraven *v.* Llewellyn, 15 Q. B. 791).
The existence of a highway (Crease *v.* Barrett, 1 C. M. & R. 919); or of a right to tolls on a public road (Brett *v.* Beales, M. & M. 416).	The existence of a private right of way over a field (Reed *v.* Jackson, 1 East 355).
The question whether certain landowners were liable to repair a bridge or sea-wall (R. *v.* Sutton, 8 A. & E. 516; R. *v.* Bedfordshire, 4 E. & B. 535; R. *v.* Leigh, 10 A. & E. 398; Hudson *v.* Tabor, 2 Q. B. D. 290).	The question whether the sheriff of a county, or the corporation of a city, was liable to execute criminals (R. *v.* Antrobus, 2 A. & E. 793).
A custom of electing the churchwardens of a parish (Berry *v.* Banner, Pea. R. 156).	A custom of electing the master of a grammar school (Withnell v. Gartham, 1 Esp.

Admissible.

A right to a pew (Price *v.* Littlewood, 3 Camp. 288; but see *post*, p. 225.)

The existence of a parish or district modus [Moseley *v.* Davies, 11 Price 162; Rudd *v.* Wright, 1 Ph. Ev. 240].

A right of common to all tenants of a manor [Dunraven *v.* Llewellyn, *supra;* Warwick *v.* Queen's Coll., 40 L. J. Ch. 785]; or a custom of descent (Denn *v.* Spray, 1 T. R. 466), or of heriot (Damerell *v.* Protheroe, 10 Q. B. 20), in a manor.

A lord's prescriptive right of freewarren over the entire manor (Carnarvon *v.* Villebois, 13 M. & W. 313); or claim to the minerals under a certain district (Barnes *v.* Mawson, 1 M. & S. 77; Crease *v.* Barrett, *supra*).

(*b*) To prove a custom of a manor;—declarations from deceased tenants of, or even mere residents in, the manor are admissible (Dunraven *v.* Llewellyn, 15 Q. B. 791).—So, to prove a custom of mining, declarations by deceased owners of the surface, though they had no interest in the mines (Crease *v.* Barrett, *supra*).—To prove that a public building was within the hundred of B.;—ancient orders made by justices at Quarter Sessions for the county so describing it, are admissible without proof that the justices resided in the hundred or county,—their competency being presumed from their office (D. of Newcastle *v.* Broxtowe, 4 B. & Ad. 273).—So, competent knowledge will be presumed from the declarants having been called as witnesses in an ancient suit (Freeman *v.* Phillips, 4 M. & S. 486); or becoming parties to an Inclosure Act (Carnarvon *v.* Villebois, 13 M. & W. 313); or to Conditions

Inadmissible.

324); or a right of presentation to a living (R. *v.* Eriswell, 3 T. R. 723).

The existence and nature of a farm modus (Wells *v.* Jesus Coll. 7 C. & P. 284; Pritchett *v.* Honeyborne, 1 Y. & J. 135).

A prescriptive right of common to individual tenants of a manor (Dunraven *v.* Llewellyn, *supra*); or the right of all the tenants to cut and sell wood (Blackett *v.* Lowes, 2 M. & S. 494).

A lord's prescriptive right to all wreck within the manorial boundaries (Talbot *v.* Lewis, 1 C. M. & R. 495; Stackpoole *v.* The Queen, L. R. 9 Eq. 619).

(*b*) The question being as to the boundaries of a county;—declarations by deceased law officers and dignitaries of the Crown, who had no personal knowledge of the subject except what they derived from an irregular judicial inquiry, are inadmissible (Rogers *v.* Wood, 2 B. & Ad. 245; *post*, p. 193).

Admissible.	*Inadmissible.*
of Sale (Williams *v.* Goodchild, cited 2 Eagle on Tithes, 440).	
(*c*) The question in an action being as to the boundaries between two manors; — former non-contentious proceedings on the joint petition of previous owners of the two manors alleging that disputes as to the boundary were likely to arise, are admissible (Brisco *v.* Lomax, 8 A. & E. 198; and see Gee *v.* Ward, 7 E. & B. 509).—So, proceedings in an ancient suit brought to decide the possession of a fishery, as between two *private* claimants, are admissible in a subsequent suit involving the right of the *public* as against the descendants of one of them (D. of Devonshire *v.* Neill, 2 L. R. Ir. 132).—So, the question being as to the mode of assessment of a customary fine;—depositions in an ancient suit against a former lord, in which only the *amount* of the fine, and not its mode of assessment, was in question, are admissible, the *lis mota* being different (Freeman *v.* Phillipps, 4 M. & S. 486).	(*c*) The question being as to a right of common in a manor;—declarations as to the right made by deceased manor tenants during a former (although irregular) inquiry, as to the same right, are inadmissible, being *post litem motam* (Richards *v.* Bassett, 10 B. & C. 657).
(*d*) The question being whether a road was public or private;—declarations by deceased residents in the neighbourhood that it was public (Crease *v.* Barrett, 1 C. M. & R. 925); or that it was private (Drinkwater *v.* Porter, 7 C. & P. 181), are admissible.—So, to prove that the boundary of a town extended to a certain spot, declarations by deceased inhabitants that it extended thither are receivable (see Ireland *v.* Powell, Pea. Ev. 16).	(*d*) The question being whether a road was public or private;—declarations by a deceased resident in the neighbourhood that he had seen repairs done upon it (R. *v.* Bliss, 7 A. & E. 550); or proof that he had planted a tree near the road, stating at the time that he did it to show where the boundary had been when he was a boy (*ibid.*); are inadmissible as relating to particular facts.—So, to prove that a town extended to a certain spot, declarations by deceased inhabitants that houses formerly stood at that spot, are inadmissible (Ireland *v.* Powell, cited R. *v.* Bliss, *supra*).
The question being as to a	The question being as to a

Admissible.	*Inadmissible.*
right of common ;—declarations by deceased manor tenants that they possessed unlimited right of common, but for convenience had agreed to use it in a restricted manner, held admissible to prove the general right, and to negative a prescription for the restricted one (Chapman *v.* Cowlan, 13 East 10).	right of common ;—declarations by deceased manor tenants that "the commons belong to the tenants unstinted, who have always enjoyed the same at a yearly rent of 33*s.* 4*d.*," have been rejected (Crease & Barrett, *supra*).
To disprove a manorial custom ;—an old deed, purporting to state the customs, and made between a former lord and certain of the copyholders, but which omitted the alleged custom, is receivable [Anglesea *v.* Hatherton, 10 M. & W. 218—omission from an ancient customary was held conclusive against the custom in Portland *v.* Hill, L. R. 2 Eq. 765].	
(*e*) To prove the boundary of a manor ;—an ancient lease, granted by a former lord, in which the boundaries were described, is receivable (Doe *v.* Wittcomb, 6 Ex. 601 ; Brett & Beales, M. & M. 416).	(*e*) To prove the boundary of a manor ;—a statement by a deceased steward that there existed an old lease describing the boundary, and an entry in his books purporting to state the substance of the lease, held inadmissible, as being reputation not of the boundaries, but of the contents of the lease—*i.e.*, of a particular fact (Doe *v.* Wittcomb, *supra*).
To prove lands tithe-free, an old catalogue and particulars of sale in which they were so described have been received (Williams *v.* Goodchild cited 2 Eagle on Tithes, 440).—So, to prove that a road was not a highway, a document signed by several deceased residents in the locality at a public meeting called to consider the question of repairing the road, and which document stated that the road was not a highway (Barraclough *v.* Johnson, 8 Ad. & El. 99).—So, a paper, preserved among the muniments of a manor, purporting to be signed by several deceased copyholders, has been admitted to prove a right of common (Chapman *v.* Cowlan, *supra*).	

Admissible.	*Inadmissible.*
To prove the existence of a manor;—an old Private Act under which it had been sold, and wherein it was so described, held admissible (Curzon *v.* Lomax, 5 Esp. 60).	To prove a lord's right to toll on all coal exported within the manor;—a general saving of such right contained in certain private (Harbour and Canal) Acts affecting the manor, held inadmissible as reputation of such right (Beaufort *v.* Smith, 4 Ex. 450).
So, to prove a lord's right of freewarren;—recitals in an old Inclosure Act, and a proviso therein preserving the right, have been received (Carnarvon *v.* Villebois, 13 M. & W. 313).	
To prove the boundaries of a parish;—a map, thirty-four years old, made by a surveyor, who testified that he had compiled it from information received from a deceased parishioner who had shown him the boundaries, is admissible [R. *v.* Milton, 1 C. & K. 58. In Pollard *v.* Scott, Pea. R. 19, however, a map made by the directions of former churchwardens was rejected; *sed qu.*, unless upon the ground that no proof of their death was given (see 1 Phil. Ev. 182; Tay. s. 662)]. —So, to prove a public right of way over a manor;—a map used by a deceased steward to define the public ways of the manor, is admissible (see Pipe *v.* Fulcher, 28 L. J. Q. B. 12).	To prove the boundaries of a parish;—an old map, not signed, but merely produced by the representatives of a deceased rector from an old box of his papers relating to the parish, is inadmissible (Earl & Lewis, 4 Esp. 1).—So, to prove the boundaries of a county;—a map of the county, republished in 1766 with *corrections and additions* by the sons of K. from a map published by the latter thirty years earlier, who then took an accurate survey of the whole county, is inadmissible, the new editors not being proved to have personal knowledge, nor to be connected with the district, so that it might be presumed [Hammond *v.* Bradstreet, 10 Ex. 390. Nor does the fact of its production from the custody of a county magistrate (living) who had bought it twelve years previously vouch for its authenticity].—So, to prove a public right of way over a manor;—a map made by a deceased steward showing the lines of a road, but with nothing to indicate whether it was public or private, is inadmissible; and the fact that it was used by him to define, not the alleged public road, but merely the boundaries of the copyholds, is not sufficient to render it receivable (Pipe *v.* Fulcher, *supra*).

Admissible.

To prove the boundaries of a manor;—a public survey of the manor taken under the authority of the Crown, or of the Duke of Cornwall, while it belonged to either (Smith *v.* Brownlow, L. R. 9 Eq. 241), or under the authority of Parliament during the Commonwealth, is admissible (Freeman *v.* Reed, 4 B. & S. 174; the Court in this case remarking that it was sufficient for the purposes of reputation if taken under the *de facto* authority of a usurper).

In an action against a trespasser, who justified under a public right of way over the land;—a verdict obtained against a former trespasser, who justified under the same right of way, is admissible (Reed *v.* Jackson, 1 East 355; Petrie *v.* Nuttall, 11 Ex. 569); so, a similar judgment obtained only four years before against another trespasser, though no execution or satisfaction be shown (Carnarvon *v.* Villebois, 13 M. & W. 313).—So, the question being whether A., a landowner, was liable to repair a neighbouring public bridge;—the record of an old presentment, *temp.* Edw. IV., in proceedings against the owners of other neighbouring land, in which the jury stated they did not know who were liable to repair the bridge, and finding that it was built sixty years before of alms, is admissible (R. *v.* Sutton, 8 A. & E. 516).—So, orders of Commissioners of Sewers, requiring certain landowners to repair sea-walls, are evidence of reputation to fix such liability (R. *v.* Leigh, 10 A. & E. 398).

Inadmissible.

To prove the boundaries of a manor;—surveys taken by former lords (*e.g.*, the Earl of Leicester, *temp.* Eliz. and General Oliver Cromwell, 1650), and founded upon *unsigned* presentments of jurors, are inadmissible [Daniel *v.* Wilkin, 7 Ex. 429; Beaufort *v.* Smith, 4 Ex. 450; *aliter* if the presentments had been signed by a manor jury; overruling on this point Evans *v.* Taylor, 7 A. & E. 617].—So, to prove a right of common;—the Ordnance Survey and Tithe Commutation Maps have been rejected as evidence of reputation (Bidder *v.* Bridges, 34 W. R. 514).

On a question as to the mutual rights of a city and a county;—an old decree finding the rights, and made by the Lord Treasurer, the Lord Chancellor, and the law officers, constituting an informal legal tribunal, and having no personal knowledge of the matter except what they acquired during the inquiry, is inadmissible (Rogers *v.* Wood 2 B. & Ad. 245).—So, on the question whether A. had a freehold or only a right of common over land;—a former presentment of the manor jury purporting to decide this question is inadmissible, either as a presentment, for they had no jurisdiction to inquire into the freehold; or as reputation, being *post litem motam* (Richards *v.* Bassett, 10 B. & C. 657).

The question being as to a public right of fishing;—an ancient writ reciting claims which would tend to negative the right, and directing inquiry to be made into them, and possession to follow the result, but upon which no verdict or judgment was given, is inadmissible (Devonshire *v.* O'Neill,

Admissible.	*Inadmissible.*
	2 L. R. Ir. 165).—So, on a claim of toll, an ancient information or indictment in respect of the claim, but upon which there was no finding by a jury, has been rejected (Lancum *v.* Lovell, 6 C. & P. 437).

CHAPTER XXVII.

DECLARATIONS AS TO PEDIGREE.

DECLARATIONS made by deceased relatives, *ante litem motam*, are admissible to prove matters of pedigree.

Principle.—The grounds of reception are—*necessity*, such inquiries generally involving remote facts of family history known to but few, and incapable of direct proof; and the *peculiar means of knowledge and absence of interest to misrepresent* of the declarants—members of the family having the greatest interest in seeking, the best opportunities of obtaining, and the least motives for falsifying, information on such subjects (Tay. s. 635).

[Tay. ss. 635–657; Best, s. 498; Ros. N. P. 44–48; Powell, 186–196; Steph. art. 31; Hubback's Ev. of Succession, 648–711; Whart. ss. 201–225].

(1) **What are Matters of Pedigree.**[a]—It is not easy to define, save by enumeration, what is a "genealogical purpose" or what are "matters of pedigree." But the terms appear to be confined primarily to issues involving *family succession* (testate or intestate), *relationship*, and *legitimacy*; and secondly to those particular incidents of family history which are immediately connected with, and required for the proof of, such issues—*e.g.*, the *birth*, *marriage*, and *death* of members of the family, with the respective *dates* and *places* of those events (Tay. 643–646; Steph. art. 31); *age*, *celibacy*, *issue* or *failure of issue* (Hubb. 204, 468, 648–650); as well, probably, as *occupation*, *residence*, and similar incidents of domestic history necessary to identify individuals (Hubb. 468, citing Hood *v.* Lady Beauchamp; Shields *v.* Boucher, 1 D. G. & S. 40; Rishton *v.* Nesbitt, 2 M. & R. 554; and see Lovat Peerage, 10 Ap. Cas. 763).

On the other hand, when such incidents, although inferentially tending to prove, are not immediately connected with, the question of pedigree (Tay. s. 644); or when they are not required for some genealogical purpose (Haines *v.* Guthrie, 13 Q. B. D. 818), they will be rejected.

(2) **Declarants must be Legitimately Related.**[b]—The declarations are only receivable from persons legitimately connected by blood with the family in question, or from the husbands or wives (whether the marriage be subsisting or not) of such persons.

They are not admissible from mere relatives of such husbands or wives (Shrewsbury Peerage, 7 H. L. C. 23); nor from friends, servants, or neighbours of the family (Johnson *v.* Lawson, 2 Bing. 86).

When a deceased declarant, himself competent, has spoken of another person as being his relative, it will be presumed that he intended thereby a legitimate relative (Smith *v.* Tebbitt, L. R. 1 P. & D. 354). Indeed, it seems doubtful whether the *legitimate* members of a family may, by their declarations, impeach the legitimacy of their reputed relations. Thus, declarations by a deceased uncle that his nephew was illegitimate have been rejected on the ground that they concerned one who though *de facto* related was *de jure* a stranger (Crispin *v.* Doglioni, 32 L. J. P. &. M. 109; Tay. s. 636; Steph. art. 31). A direct assertion by a deceased parent of his child's illegitimacy would seem to be open to the further objection that, as the ground of illegitimacy might be non-access during marriage, it would infringe the rule against bastardising offspring (*ante* p. 97; Murray *v.* Milner, 12 Ch. D. 849). On the other hand, declarations by a father indirectly establishing his child's illegitimacy by impeaching the validity of the marriage, or stating the birth to have preceded it, have been received (Murray *v.* Milner, *supra, per* Fry, J.; *Re* Turner, 29 Ch. D. 985, *per* Chitty, J.) So, with declarations by a deceased husband as to his wife's illegitimacy (Vowles *v.* Young, 13 Ves. 140; and see Doe *v.* Harvey, R. & M. 297).

The declarations of deceased *illegitimate* relations are wholly inadmissible to prove the condition of their family, since a bastard being *filius nullius* can have no relations (Doe *v.* Barton, 2 M. & R. 28, and see *supra;* and Doe *v.* Davies, 10 Q. B. 314. And it seems doubtful whether the declara-

tions of a deceased person even as to his *own* illegitimacy are receivable, except as admissions against himself, and those who claim under him by title subsequent to the declarations (Tay. ss. 636–637; R. *v.* Rishworth, 2 Q. B. 476; Proc.-Gen. *v.* Williams, 31 L. J. P. & M. 157). In *In re* Perton, 53 L. T. 706, however, Chitty, J., held such statements admissible, not only for, and against, those claiming the bastard's estate, but generally, as being declarations against pecuniary and proprietory interest; see also Haslam *v.* Cron, 19 W. R. 968, *per* Bacon, V.C.; and *ante*, p. 170.

(3) **Competent Knowledge. Hearsay upon Hearsay. Contemporaneousness.**[c]—It is not necessary that the declarant should have had personal knowledge of the facts stated; it is sufficient if his information purported to have been derived from other relatives, or from general family repute, or even simply from "what he has heard," provided such "hearsay upon hearsay" does not directly appear to have been derived from strangers (Shedden *v.* A.-G. 30 L. J. P. & M. 217; Tay. s. 639). But if the declarant's information purport to have been derived either wholly or in part from incompetent sources, the declarations so founded will be excluded (Davies *v.* Lowndes, 7 Scott, N. R. 211; 6 M. & G. 525).

The declarations need not refer to contemporaneous events; statements as to matters occurring six generations before have been received (Hubb. 659; Monkton *v.* A.-G. 2 R. & Myl. 157; Davies *v.* Lowndes, *supra*).

And it is not necessary that they should directly assert the genealogical fact; the status of a member of the family might be indirectly expressed by declaring that "he would have the property and be a gentleman" (Isaac *v.* Gompertz, cited Hubb. 651).

(4) **Lis Mota and Interest.**[d]—The declarations are inadmissible if made *post litem motam* (see *ante*, Public and General Rights, p. 197).

As to the degree of *interest* which will exclude, the authorities are somewhat conflicting. Declarations in direct support of a claim contemplated to be brought by the declarant (Hubb. 668–9; Tay. s. 630; citing Zouch Peerage Case), or, otherwise made obviously to subserve his own interests (Plant *v.* Taylor, 7 H. & N. 211; Dysart Peerage Case, 6 App. Cas. 489), have been rejected.

But declarations made before any controversy arose, or

claim was comtemplated, though tending to directly support the title of the declarant, or of another in *pari jure* with him, have been received (Doe *v.* Tarver, Ry. & M. 141).—So, declarations made to induce a third party to make a claim to which the declarant himself had no title, and which was in fact never prosecuted (Hubb. Ev. *supra*).

(5) **Form of the Declarations.**[e]—The following are some of the principal forms in which hearsay upon matters of pedigree may be tendered:—

Oral statements; family correspondence; recitals or descriptions in *Deeds, Settlements, and Wills* (even if cancelled or invalid); entries in *almanacs, prayer-books, and missals.*

Such declarations must, if modern, be proved to have been *made, written,* or *signed* by (or by the direction of) a deceased relation, or to have been *acknowledged* or treated by him as correct (Hood *v.* Beauchamp, 8 Sim. 26; *Re* Perton, 53 L. T. 706). In the case of deeds, indeed, proof of execution by a relation seems indispensable (Slaney *v.* Wade, 1 My. & Cr. 338; Fort *v.* Clarke, 1 Russ. 604; Hubb. 675; Tay. s. 651), save where the document is ancient and comes from proper custody, when execution by some member of the family may perhaps be presumed.

The original deed or will must, if in existence, be produced, though if lost or destroyed secondary evidence will be received. Probate of a will is, for this purpose, secondary evidence only (Hubb. 677; Ros. N. P. 47).

Family Bibles stand upon a somewhat different footing, not because of the sacred nature of the volume, but from the custom of using it as a family register. Entries therein are receivable on the grounds of publicity and family acknowledgment, without proof of identity, relationship, or (presumably) death (Berkeley Peer. 4 Camp. 401; Monkton *v.* A.-G. 2 R. & M. 162; Hubbard *v.* Lees, L. R. 1 Ex. 255).

The mere fact that the book is a Bible, however, is not sufficient; it should be shown to be a family Bible, in the sense of having been handed down and preserved as such in the family, and it should come from proper custody (Hubbard *v.* Lees, *supra*, in which case Martin, B., remarked, "It is in the nature of a record, and being produced from proper custody is itself evidence without proof of handwriting or authorship. To require such would be to mistake the distinctive character of the evidence, for

it derives its weight not from the entries having been made by a particular person, but that, being in that place, they are taken to be assented to by those in whose custody the book has been.") See, too, Splents *v.* Lefevre, 11 L. T .N. S. 114, in which the Ir. Ex. Ch. rejected entries in a Bible, partly from the absence of such preliminary proof, and partly because the entries had been made by a living person, it being said that the entries must be made or sanctioned by, or brought to the knowledge of, deceased members of the family. *Sed qu.* as to the latter qualification in the case of family Bibles.

So of inscriptions on *tombstones, coffin-plates, mural tablets, hatchments, family portraits, rings, and pedigrees;* if these are proved to have been made by, or under the direction of, a deceased relation, they will be received as *his* declarations; if they have been publicly exhibited, they will be admitted on the presumption of family acknowledgment, though their authors be alive (Tay. s. 652; Hubb. 684–694). The value of mural and other funeral inscriptions as evidence depends on the authority under which they were set up, and the distance of time between their erection and the events they commemorate. Where irremovable, defaced, or destroyed, they are provable by secondary evidence (Tay. s. 653; Hubb. 690–694). *Armorial Bearings* may also be included under this head; but their weight depends wholly on their antiquity, since corrective authority in such matters ceased to be exercised by the Heralds after the Revolution. [The first Herald's visitation was in 1528, the last in 1686.]

Family Repute and Conduct.—The tradition and repute prevailing in the family as to any genealogical event may also be proved, and will be received as presumptive evidence of its existence (*post*, p. 255).

So, family conduct and treatment—*e.g.*, the tacit recognition of relationships, the distribution of property, the omission of particular persons from mention or benefit in family wills and settlements—are admissible as showing acknowledgment or the reverse by the family, though such evidence falls, perhaps, more properly under other heads than that of hearsay (*ante* p. 53).

When a document, pedigree, or inscription has been *privately* kept, independent proof must be given of its acknowledgment by the family before it will be admissible;

but where it has been *publicly* preserved in the family, such acknowledgment may be presumed (Hubb. 685; Tay. s. 654). Such documents, however, must not, as we have seen, purport to be compiled from incompetent sources (Davies *v.* Lowndes, 7 Scott, N. R. 211).

Repute and Conduct of Strangers.—In the case of *Marriage*, the repute and conduct need not be confined to the family, reputation among and treatment by friends and neighbours being receivable (*ante*, p. 53; *post*, p. 255).

A witness deposing to the existence of such a general reputation, must not, however, state what some particular individual has said on the subject; and if it appears that his testimony is based merely on the declarations of such person, the evidence ceases to be admissible as general reputation, and can only be received if the declarant was a deceased member of the family (Shedden *v.* A.-G., 30 L. J. P. M. & A. 217).

Recognition by the Sovereign has been admitted to prove the *legitimacy* of a peer (Hubb. 698); and the conduct and statements of the paramour to prove the *illegitimacy* of a child born in wedlock (Morris *v.* Davies, 5 C. & F. 163; Aylesford Peerage Case, 11 App. Cas. 1; Burnaby *v.* Baillie, 42 Ch. D. 282). So, the conveyance of property by a stranger to a member of the family who was only entitled to it as such, has been admitted in proof of the latter's relationship to the family (Slaney *v.* Wade, 7 Sim. 595; 1 My. & Cr. 338; *ante*, p. 53).

Judicial Documents.—*Answers* in Chancery are admissible when the facts of pedigree were not in dispute, but only incidentally mentioned (Hubb. 681–683; Lyell *v.* Kennedy, 14 App. Cas. 437). If they have been *filed* they will be admissible though not signed or sworn (Shrewsbury Peerage Case, 7 H. L. C. 32); though where sworn, but not filed, they have been rejected (Wharton Peerage Case, 12 C. & F. 295). To make an answer evidence, however, the *Bill* must always be put in, though the latter is not evidence *per se* unless made so by the answer (Lyell *v.* Kennedy, *supra*; Boileau v. Rutlin, 2 Ex. 678). As to answers by guardians of infants, see Eccleston *v.* Petty Carth. 79; Slane Barony, Min. Ev. p. 28).

Recitals of relationship in a *case for the opinion of counsel* drawn on behalf of a deceased member of the family by his

solicitor, though receivable as admissions (p. 126), have been rejected as declarations by such member, on the ground that statements for counsel are frequently made to obtain a favourable opinion in order to drive persons to a reference (Slane Barony, cited Hubb. 684-685).

Judgments, Decrees, and Verdicts in matters of pedigree bind the parties and privies thereto; but if *inter alias* are inadmissible either as evidence of facts or as family reputation (Hubb. 704; *post*, Judgments), though they may be received to show the subject-matter of the suit, and the character in which the parties sue, defend, or obtain property (Davies *v.* Lowndes, 7 Scott N. R. 211; Lyell *v.* Kennedy, *supra*).

As to *Herald's Books, Inquisitions, Parish Registers*, &c., to which recourse is frequently had in cases of pedigree, and which are admissible as public documents, and not as the hearsay evidence of deceased relatives, see *post*, Public Documents.

EXAMPLES.

Admissible.

(*a*) In a claim to freehold property by B. as heir-at-law to A.;—the death of A. and of any of his relations entitled in priority to B., may be proved by family repute as being matters of pedigree (Doe *v.* Griffin, 15 East 293; Betty *v.* Nail, 6 Ir. C. L. 17). The same proof is admissible on an application by B. to administer the personal estate of A. (in the goods of Thomas, 12 P. D. 100).—So, where A. had devised lands to his son B. for life, then to B.'s sons, C. D. and E. in succession; in an action by E. to recover the lands, the deaths of B. C. and D. may be similarly proved (Palmer *v.* Palmer, 18 L. R. Ir. 192; Smith *v.* Smith, 1 L. R. Ir. 206).

Inadmissible.

(*a*) In an action for use and occupation by a reversioner against a tenant *pour autre vie* who had held over after the death of the *cestui qui vie*;—the death of the latter cannot be proved by the declarations of deceased relatives, not being a matter of pedigree (Whittuck *v.* Waters, 4 C. & P. 376).—So, in an action for goods sold, to which the defence is infancy;—the latter fact cannot be proved by an affidavit of the infant's deceased father made in a previous Chancery action to which the plaintiff was not a party (Haines *v.* Guthrie, *supra*). And inquiries as to the birth-settlement of a pauper (R. *v.* Erith, 8 East 539); or as to the age of the deceased in an action on a life policy (Splents *v.* Lefevre, 11 L. T. N. S. 114) are not questions of pedigree.

Admissible.	*Inadmissible.*
On a question of pedigree, to prove which was the eldest of three sons born at one birth ;—a declaration by their deceased father that he had for the purposes of distinction christened them Stephanus, Fortunatus, and Achaicus, according to the order of names in St. Paul's First Epistle to the Corinthians, and a declaration by their deceased aunt that she had for the same purpose tied strings round the arms of the second and third children at their birth, are admissible (Vin. Ab. Ev. T. b. 91).	The question being as to the legitimacy of A. ;—a declaration by A.'s deceased aunt that she had suckled A., coupled with proof that her own child was born subsequent to the marriage of A.'s parents, held inadmissible to prove A.'s legitimacy, not being a matter directly connected with the question of pedigree (Isaac *v.* Gompertz, Hub. Ev. 650).
(*b*) The question being whether B. and C. were cousins of A. ;—a declaration by A.'s widow (deceased), that B. and C. were his cousins, or that A. had told her they were his cousins, is admissible (Tay. s. 639).—So, a declaration by A. (deceased), as to his own age or birthplace, though such statements are necessarily founded on hearsay (Sturla *v.* Freccia, 5 App. Cas. 641).	(*b*) The question being whether B. and C. were cousins of A. ;—a declaration by A.'s father-in-law that they were A.'s cousins would be inadmissible (see Shrewsbury Peerage, 7 H. C. L. 23).
(*c*) See two last examples ; and Davies *v.* Lowndes opposite.	(*c*) To prove the descent of A.;—a pedigree in the handwriting of one of A.'s ancestors, purporting to be derived *partly* from "parish registers, wills, monumental inscriptions, family history and records" (not shown to be lost) ; and *partly* from personal knowledge and the information of other deceased relations, held inadmissible as to former but admissible as to the latter part (Davies *v.* Lowndes, 7 Scott 211. Had the incompetent sources not been expressly disclosed the first portion would apparently also have been received, although dating back to a remote antiquity).
(*d*) In an action by B. to recover land as heir-at-law to A. ; —an affidavit stating B.'s relationship to A. and made by a	(*d*) The question being as to the legitimacy of A. ;—declarations made after the following letters had passed in the family,

Admissible.

deceased relative in a previous non-contentious proceeding in Chancery, in which an inquiry was directed as to who was A.'s heir and next-of-kin, held admissible, such a proceeding not constituting a *lis mota* (Gee *v.* Ward, 7 E. & B. 509; *aliter* as to sworn or unsworn affidavits in contentious proceedings on the same issue, Hill *v.* Hibbit, 19 W. R. 250 *note*).—On a similar claim;—declarations by B.'s mother that certain other members of the family had died without issue, held admissible, although the declarant was entitled to an interest in remainder upon the death of such persons without issue (Doe *v.* Tarver, Ry. & M. 141).

(*e*) A declaration as to pedigree contained in a will, never signed or executed by the testator, but in his handwriting, is admissible (*Re* Lambert 56 L. T. 15). So, a will executed, but afterwards cancelled (Doe *v.* Pembroke, 11 East 504).

On a question of pedigree to prove that A. was the son of B., a notarial protest, and the

Inadmissible.

held inadmissible as *post litem motam*:—

(1) A letter from A., written after his parents' death, to B., his reputed uncle (who was in possession of the family property in default of lawful issue of A.'s father), saying, "What I want is to establish my legitimacy, though whether I have a right to the estate I know not;" (2) a letter from B. to another member of the family, telling him of A.'s claim, and adding, "The estate I cannot give up, as it is entailed on my children" (Frederick *v.* Attorney-General, L. R. 3 P. & D. 196).

The question being whether B. was the legitimate son of A. by his second wife, and proof having been given that A.'s first wife was alive at the time of his second marriage, a declaration by A. (deceased) that the husband of his first wife was living when A. married her, is inadmissible, as obviously in A.'s own interest (Plant *v.* Taylor, 7 H. & N. 211).

So, where A. was proved to have lawfully married B., but there was some evidence that C., living with him at the time, was reputed to be his wife, a declaration by A. (deceased) that C. and not B. was his lawful wife, is inadmissible (Dysart Peerage Case, 6 App. Cas., 489; both in English and Scotch law).

(*e*) To prove that A. is the son of B., a deed reciting that fact, and by which C. (a stranger) assigned property to A. as B.'s son, is inadmissible as a declaration, C. being a stranger, though *aliter* to show A.'s enjoyment of property as B.'s son (Slaney *v.* Wade, 7 Sim. 595; 1 My. and Cr. 338; and see Fort *v.* Clarke, 1 Rus. 604).

Admissible.	*Inadmissible.*
record of proceedings in an action on a bill of exchange (the action not involving any question of pedigree), in which A. was sued as (and by his defence admitted himself to be) the son and representative of B., held admissible, if coupled with some proof *aliundé* connecting A. with the family (Lyell *v.* Kennedy, 14 App. Cas. 437).	

CHAPTER XXVIII.

DYING DECLARATIONS IN CASES OF HOMICIDE.

IN trials for murder or manslaughter the dying declarations of the deceased, made under the sense of approaching death, are admissible to prove the circumstances of the crime.

Principle.—The grounds of admission are twofold,—*necessity*, for the victim being generally the only eye-witness to such crimes, the exclusion of his statement would tend to defeat the ends of justice; and the *sense of impending death*, which creates a sanction equal to the obligations of an oath.

[Tay. ss. 714–722; Best, s. 505; 3 Russ. Cr. 354–362; Ros. Cr. Ev. 33–39; Powell, 197–205; Steph. art. 26.]

(1) **Homicide of Declarant.**[a]—The declarations are not admissible upon charges other than *homicide;* or as to homicides other than that of *the declarant.*

The latter part of this limitation was somewhat infringed in R. *v.* Baker, 2 M. & Rob. 53. In that case A. and B. had both died from eating a cake into which the prisoner was accused of putting poison. On his trial for A.'s murder, the dying declarations of B. (made after A.'s death) that she, B., had made the cake in the prisoner's presence, and had put nothing bad into it, were received, upon the ground that the two deaths by the same poisoning were all one transaction. The point would, however, have been reserved, but the prisoner was acquitted. In R. *v.* Hind (29 L. J. M. C. 147; Bell C. C. 253; 8 Cox 300), in which R. *v.* Baker was cited, Pollock, C.B., held, adopting the doctrine of R. *v.* Mead (2 B. & C. 605), that the true rule confined

the declarations to charges involving the homicide of the declarant. In America the preponderance of authority is to the same effect. [1 Greenleaf (14th ed.), s. 156, note (*b*); Chamberlayne's Best, s. 505, note (*d*).]

(2) **Condition at Time of Declaration.**[(b)]—The deceased must be proved to the satisfaction of the judge to have been, at the time of making the declaration, in *actual danger of death*, and to have *abandoned all hope of recovery*.

If these conditions concur, it is immaterial that he lingered for some days, or even weeks (R. *v.* Bernadotti, 11 Cox, 316; Craven's case, 1 Lew. 77), or that he subsequently entertained hope (R. *v.* Hubbard, 14 Cox, 565; not following in this respect R. *v.* Fagent, 7 C. & P. 238; and R. *v.* Megson, 9 C. & P. 418).

Questions of admissibility arise chiefly with respect to the mental condition of the declarant. There must be a "settled, hopeless, expectation of death," not qualified by any prospect of recovery, however slight (R. *v.* Jenkins, L. R. 1 C. C. R. 187; R. *v.* Peel, 2 F. & F. 21; R. *v.* Gloster, 16 Cox 471); it need not, however, as was at one time held, be an expectation of instant or immediate death —a belief that death would very shortly ensue is sufficient (R. *v.* Reaney, 7 Cox 209; 26 L. J. M. C. 43; R. *v.* Gloster, *supra*); while, on the other hand, a belief that death might be long deferred would exclude (*ibid.*; R. *v.* Forester, 10 Cox 368).

The declarant's mental condition may be inferred from his own statements at the time; his conduct (as in taking leave of his friends, giving directions for his funeral, receiving extreme unction, &c.); the opinions of medical or other attendants expressed to him; the serious nature of the injury received (though it seems doubtful if this alone is sufficient, R. *v.* Cleary, 2 F. & F. 850; R. *v.* Morgan, 14 Cox, 337; R. *v.* Bedingfield, *id.* 341), and other attendant circumstances.

(3) **Competency and Credibility.**—The declarant must have been competent as a witness; thus, imbecility or tender age will exclude the declaration. (R. *v.* Drummond, 1 Leach C. C. 338; R. *v.* Pike, 3 C. & P. 598; R. *v.* Perkins, 9 C. & P. 395.)

And his credibility may, perhaps, be impeached in the same manner as that of a witness. [There is no express

English authority, but see last-mentioned cases and Steph. art. 136. In America, however, the rule is established: 1 Greanleaf, 14th ed. s. 157, note (*a*); Chamberlayne's Best, s. 505, note (*e*); Bishop's Cr. Proc. 1209; Felder *v.* State, 59 Am. Rep. 777, where previous inconsistent statements by the deceased, not made under the fear of death, were admitted for this purpose.]

(4) **Subject-matter of the Declaration.**—The declarations are only admissible to prove the *cause and circumstances of death*, and not *previous or subsequent transactions*, although relevant to the issue. [R. *v.* Mead, *supra;* R. *v.* Hind, *supra;* R. *v.* Murton, 3 F. & F. 492; Steph. art. 26. In America, also, the declarations are restricted to the *res gestæ;* those relating to independent transactions being excluded, as not falling within the principle of necessity on which such evidence is received: People *v.* Fong, 5 Cr. Law Mag. 64; Montgomery *v.* State, 80 Ind. 338.]

Nor must they include matter inadmissible from the mouth of a witness—*e.g.*, hearsay or opinions. (R. *v.* Sellers, Carr. C. L. 233; 1 Greenleaf, s. 159, note (*a*).) And they should be *complete*, conveying the whole of what the declarant intended to say; an unfinished statement, or one which the declarant intended, but was prevented from, qualifying, being inadmissible. (Greenleaf, *supra.*)

(5) **Miscellaneous.**—The declarations may be oral or written; and they are not rendered incompetent (though their weight may be impaired) through being made in response to leading questions (R. *v.* Smith, 10 Cox 82), or earnest solicitation (R. *v.* Fagent, 7 C. & P. 238; R. *v.* Reason, 1 Str. 499; R. *v.* Whitworth, 1 F. & F. 382); or through having been taken as depositions, and proving inadmissible as such. (R. *v.* Woodcock, 1 East P. C. 356).

They are evidence either for or against the prisoner. (R. *v.* Scaife, 1 Mo. & Rob. 551.)

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) A. is indicted for the murder of B.;—a dying declaration by B. that A. had murdered him is admissible (R. *v.* Mosley, 1 Moo. 97).	(*a*) A. is indicted for robbing B.;—a dying declaration by B. as to the circumstances of the robbery is inadmissible (R. *v.* Lloyd, 4 C. & P. 233) A. is indicted for the murder

Admissible.

(*b*) Declarations have been received after proof of the following expressions by the deceased:—

"Be quick, or I shall die" (R. *v.* Bernadotti, 11 Cox 316). "I am dying, look to my children" (R. *v.* Goddard, 15 Cox 7). "I am getting worse; I am going to die" (R. *v.* Pickersgill, cited Ros. Cr. Ev. 35). "I have seen the surgeon to-day and he has given me some little hope that I am better; but I do not myself believe that I shall ultimately recover. . . . I cannot recover." [R. *v.* Reaney, 7 Cox 209. In this case much stress was laid on the word "ultimately" as a reason for rejecting the declaration; but it was held that it did not, under the circumstances, import a belief in a deferred as opposed to an impending death.]

The deceased himself had, at the time of making a declaration, no hope of recovery, although his doctor had a hope and had expressed it to him. Declaration admitted (R. *v.* Mosley, 1 Moo. 97; R. *v.* Peel, 2 F. & F. 21).

The deceased (a boy of eleven) being badly wounded, asked the doctor if he should recover. The latter replied, "In all probability you will not recover. . . . . You may recover, it is impossible for me to say, but I don't think you will be alive by the morning." The deceased made no reply, but his countenance changed, and he appeared distressed. A declaration then made, held admissible (R. *v.* Perkins, 9 C. & P. 395).

Inadmissible.

of B.;—a dying declaration by C. that he and not A. had murdered B., is inadmissible (R. *v.* Gray, Ir. Cir. Rep. 73).

(*b*) Declarations have been rejected after proof of the following expressions by the deceased:—

"I think myself in great danger" (R. *v.* Errington, 2 Lew. C. C. 148). "I was in hopes of getting better; but as I am getting worse, I think it my duty to mention what has taken place" (R. *v.* Megson, 9 C. & P. 418). "I think I shall not recover, as I am very ill" (R. *v.* Spilsbury, 7 C. & P. 187). "I don't think I shall ever get up again. . . . I don't think I shall be long with you. . . . I hope I shall get well, but do not think so. . . . I feel sure I shall never get up alive again. . . . I give the following directions in case I die" (R. *v.* Gloster, 16 Cox. 471). "I have no hope of recovering, unless it be the will of God" (R. *v.* Murphy, Ir. Cir. Rep. 38).

The deceased having been told by the doctor that she would not recover, replied, "I hope, doctor, you will do what you can for me, for the sake of my family." Declaration then made rejected (R. *v.* Crockett, 4 C. & P. 544).

The deceeased having made a statement, which was taken down in writing by a third person, concluded, "I make the above statement with the fear of death before me, and with no hope of recovery." Afterwards, on the statement being read over to her, she corrected it to, "with no hope *at present* of my recovery." Declaration rejected (R. *v.* Jenkins, L. R. 1 C. C. R. 187).

CHAPTER XXIX.

DECLARATIONS BY TESTATORS AS TO THEIR WILLS.

THE declarations of deceased testators as to their wills have been admitted in the following cases :—

(1) **To show what Documents constitute the Will**[a] (Gould *v.* Lakes, 6 P. D. 1; in the goods of Slinn, 15 P. D. 156). The declarations in this case may have been made either before, at, or after the execution of the will.

The execution of a will cannot be established by the declarations of the testator, strict proof being generally required of compliance with the statutory formalities (*Re* Ripley, 1 S. & T. 68; Doe *v.* Palmer, 16 Q. B. 747; Sugden *v.* St. Leonards, 1 P. D. 154, *per* Cockburn, C.J.). Such evidence has, however, been received to complete a *primâ facie* compliance with the statute (Clarke *v.* Clarke, 5 L. R. I. 47; *Re* Malins, 19 L. R. Ir. 231; Flood *v.* Russell, 29 L. R. I. 91; cases which have certainly gone far towards relaxing the stringency of the earlier rule.

(2) **To establish the continued Existence of the Will,**[b] in rebuttal of the presumption that a will proved to have been in the custody of the testator, and not forthcoming at his death, has been destroyed *animo revocandi* (Finch *v.* Finch, L. R. 1 P. & D. 371; Sugden *v.* St. Leonards, *supra*, *per* Cockburn, C.J.).

Such declarations must necessarily have been made after the execution of the will.

Revocation of the will cannot be proved by declarations made subsequently to the act of revocation (Staines *v.* Jones, 5 L. T. N. S. 457), though prior and contemporaneous declarations are admissible for that purpose (Newton *v.* Newton, *id.* 218.).

(3) **To Prove (as secondary evidence) the Contents of a**

Lost Will [c] (Sugden *v.* St. Leonards, *supra;* Woodward *v.* Goulstone, 11 App. Cas. 477; Harris *v.* Knight, 15 P. D. 170; *Re* Ball, 25 L. R. Ir. 556; Flood *v.* Russell, *supra*).

In all of these cases, with the exception of Woodward *v.* Goulstone, declarations made both *before* and *after* the execution were admitted; in that case, however, grave doubts were expressed by some of the law lords as to the admissibility of *post*-testamentary declarations for that purpose.

Principle.—The grounds assigned for the admission of the evidence are: *The peculiar means of knowledge* of the testator, and his *absence of interest to misrepresent* (Sugden *v.* St. Leonards, *supra*). It is to be observed, however, that in no other instances have such conditions alone sufficed for the reception of declarations by deceased persons; so that the decisions above quoted, so far as they establish this exception to the hearsay rule, savour of judicial legislation (*ibid. per* Mellish, L.J. *diss.*; Woodward *v.* Goulstone, *supra*).

Declarations of Intention.—The distinction between hearsay and original evidence is not, however, satisfactorily marked in the above cases. Thus, in those establishing (1) and (3) the most material part of the evidence received, consisted of declarations of intention made by the testator before the execution of the will. Such evidence is obviously not hearsay at all, but original in its nature. Indeed, with the exception of the post-testamentary declarations in Sugden *v.* St. Leonards, and the cases following it, whose admissibility was questioned in Woodward *v.* Goulstone, the whole of the declarations in (1), (2), and (3) appear to have been received rather as indications of the state of mind of the testator at the time of making the declarations than as proof of the facts asserted. Their reception can therefore be supported without reference to the hearsay rule.

It is on this ground, and not as exceptions to the rule, that declarations of intention by testators are admitted in other analogous cases—*e.g.*, to rebut the presumption that alterations, interlineations and erasures appearing on the face of the will were made subsequently to its execution (Doe *v.* Palmer, *supra; re* Sykes, L. R. 3 P. & D. 26; Dench *v.* Dench, 2 P. D. 60; Sugden *v.* St. Leonards, *supra;* Tay. s. 165; post-testamentary declarations are not receivable for this purpose, Doe *v.* Palmer, *supra;*), or to explain

a latent, though not a patent, ambiguity; or to rebut an equity; or to support or impeach the will in cases of fraud or forgery (Doe *v.* Hardy, 1 M. & R. 525; Doe *v.* Allen, 8 T. R. 147; and see *post*, Admissibility of Extrinsic Evidence to affect Documents).

[Tay. ss. 1136, 1206–1231; Ros. N. P. 55; Steph. art. 29.]

EXAMPLES.

Admissible.

(*a*) The question being whether certain papers formed part of a will;—declarations made by the testator *before* executing the alleged will that he intended to leave his property in a manner which corresponded with the dispositions contained in such papers; and declarations *after* the execution that he had so left his property held admissible (Gould *v.* Lakes, 6 P. D. 1; *Re* Slinn, 15 P. D. 156).

A will having been attested by two witnesses, but without anything to show that they and the testator were all present together at its execution;—a memorandum in the handwriting of the testator found after his death in a sealed envelope, together with an abstract of the will, the memorandum stating that "both witnesses had signed before him," held admissible (*Re* Malins, 19 L. R. Ir. 231).

(*b*) A testator having made his will in favour of A. and the will not being forthcoming at his death;—declarations made after its execution and shortly before his death that he had left all his property to A. and that she would find his will in a particular drawer are admissible as showing that he had not destroyed or cancelled the will (Finch *v.* Finch, L. R. 1 P. & D. 371).

Inadmissible.

(*a*) The question being whether a certain will was duly executed;—declarations by the testator that the will had been duly executed and attested, are inadmissible (Doe *v.* Palmer, 16 Q. B. 747). So, to prove the execution of a lost will; a copy sent by the testator from abroad with a letter in which he stated that he had "duly made the original," are inadmissible (*Re* Ripley, 1 S. & T. 68; but see Clarke *v.* Clarke & Flood *v.* Russell, *supra*).

The question being whether certain alterations appearing on the face of a will, were made before or after its execution;—declarations by the testator *after* the execution, that they had been made before it, are inadmissible (Doe *v.* Palmer, *supra*. Declarations of intentions made *before* the execution, in a sense corresponding to the alterations, are admissible, *id.*; and see Gould *v.* Lakes, *supra*).

(*b*) The question being whether a will proved to have been in the testator's custody but not forthcoming at his death, had been destroyed *animo revocandi*;—declarations by the testator that he revoked or destroyed the will, are inadmissible (Staines *v.* Jones, 5 L. T. N. S. 457. Declarations prior to or contemporaneous with the act of destruction would be admissible as implied evidence, Newton *v.* Newton, *id.* 218).

Admissible.

(*c*) To prove the contents of a lost will;—verbal instructions for the will given by the deceased testator; a draft authenticated by him; and declarations as to the provisions he was about to make in it, are admissible; declarations *after* the execution of the will that his daughter would be wealthy and a landed proprietor and enjoy the same comforts and style as she was then doing, also held admissible (Sugden *v.* St. Leonards. 1 P. D. 154. Declarations by a testator that he had made a will containing certain provisions; and subsequent declarations by the same testator that he had made no will, were respectively admitted in Harris *v.* Knight, 15 P. D. 170; and see *Re* Ball 25 L. R. Ir. 556; and Flood *v.* Russell, 29 L. R. I. 91.)

CHAPTER XXX.

STATEMENTS IN PUBLIC DOCUMENTS.

THE third class of exceptions to the hearsay rule consists of statements contained in public or official documents; which, subject to the qualifications hereinafter specified, are admissible in proof of the facts recorded even against strangers.

Principle.—The general grounds of reception are (1) that the statements and entries have been made by the *authorized agents of the public in the course of official duty;* and (2) that the facts recorded are of *public interest or notoriety.* To which it may be added that it would not only be difficult, but often impossible, to prove facts of a public nature by means of actual witnesses examined upon oath (Greenleaf s. 483; Tay. s. 1591).

The following are the principal documents of this description:—

(1) Statutes, State Papers, and Gazettes.
(2) Public Registers.
(3) Public Inquisitions, Surveys, Assessments, and Reports.
(4) Official Certificates and Licences.
(5) Corporation, Company, and Banker's Books.
(6) Published Histories, Maps, and Tables.

STATUTES AND STATE PAPERS.—Statements and recitals of public matters contained in any *public statute; Royal proclamation* (R. *v.* Sutton, 4 M. & S. 532; R. *v.* de Berenger, 3 M. & S. 67); *Speech from the Throne; Address to the Crown* from either House of Parliament (R. *v.* Franck-

lin, 17 How. St. Tr. 636–638; Tay. s. 1661); *State Paper* (Thelluson *v.* Cosling 4 Esp. 266); including, perhaps, *diplomatic correspondence* (see R. *v.* Francklin, 17 How. St. Tr. 638; Radcliffe *v.* Un. In. Co. 7 Johns. 38; Talbot *v.* Seeman, 1 Cranch. 1, 37, 38); or *Parliamentary Journal* (upon all matters properly before either House, Jones *v.* Randall, 1 Cowp. 17; Root *v.* King, 17 Cowen 613, but not upon extraneous matters, Oates' case, 10 How. St. Tr. 1165–1167), are in general *primâ* but not conclusive evidence of the facts recited (R. *v.* Greene, 6 A. & E. 548; R. *v.* Francklin, *supra*).

Private Acts (even though containing clauses requiring them to be judicially noticed as public statutes) are not, in general, evidence against strangers either of the *facts* recited (Brett *v.* Beales M. & M. 421; Taylor *v.* Parry, 1 M. & G., 604; Beaufort *v.* Smith, 4 Ex. 450; Cowell *v.* Chambers, 21 Beav. 619; Mills *v.* M. of Colchester, 36 L. J. C. P. 214; Polini *v.* Gray, 12 Ch. D. 411); or as *notice* of such facts (Ballard *v.* Way, 1 M. & W. 529). They are, however, receivable, *inter alios*, in peerage claims, if passed at a date when it was the practice for the evidence upon which they were founded to be approved by the judges (Wharton Peerage, 12 C. & F. 302; see, however, Polini *v.* Gray, *supra*); though not if passed after the discontinuance of this practice (Shrewsbury Peerage, 7 H. L. C. 13). As to their admissibility as evidence of reputation, see *ante*, pp. 186, 192.

[Tay. ss. 1660–1661; Ros. N. P. 187–188; Steph. art. 33; Whart. ss. 635–638.]

EXAMPLES.

Admissible.	*Inadmissible.*
To prove that certain organised outrages had occurred in various parts of England;—recitals that the outrages had occurred—contained in a public statute, and also in a Royal Proclamation, which offered a reward for the discovery of the perpetrators—are admissible (R. *v.* Sutton, 4 M. & S. 532; and see R. *v.* de Berenger, 3 M. & S. 67, 69). So, to prove the existence and nature of certain political controversies	To prove the existence of a certain Popish plot;—a resolution of the House of Commons stating the existence of such plot is inadmissible (Oates' Case, 10 How. St. Tr. 1165–1167). To prove the title of the lords of a manor to toll on all coal exported within the manor;—a Private Act preserving such right is inadmissible (Beaufort *v.* Smith, 4 Ex. 450; see *ante*, p. 192).

Admissible.	*Inadmissible.*
between the Kings of England and Spain;—entries in the journals of the House of Lords (or copies of such entries) are admissible (R. *v.* Francklin, 17 How. St. Tr. 636–638). And entries in the journals of the Committee of Privileges have been received to show the limitations in a patent of nobility, though the patent itself might have been produced (Dufferin Peerage, 4 C. & F. 568). To prove the date of the commencement of a war between two foreign States;—a paper from the Secretary of State's office, transmitted by the British Ambassador at the Court of one of such States, and purporting to be a declaration of war by one of the States, is receivable (Thelluson *v.* Cosling, 4 Esp. 266).	

GOVERNMENT GAZETTES.—The Government Gazettes of London, Edinburgh, and Dublin are admissible (and sometimes conclusive) evidence of the public, but not of the private matters contained therein.

[Tay. ss. 1527, 1662–1666; 2 Phil. Ev. 10th ed. 138–140; Whart. ss. 671–675.]

At **Common Law** the *Gazette* is evidence of Acts of State —*e.g.*, addresses to the Crown; proclamations for reprisals, public peace, or quarantine (R. *v.* Holt, 5 T. R. 443; A.-G. *v.* Theakstone, 8 Pri. 89; Quelch's Case, 8 St. Tr. 212); articles of capitulation for the surrender of an island (Picton's Case, 30 How. St. Tr. 493); but it is not evidence of acts of public officials, having slight or no reference to the affairs of Government—*e.g.*, the grant of land to a subject (R. *v.* Holt, *supra*); an order in Council for the division of a parish (Greenwood *v.* Woodham, 2 M. & R. 363); or the appointment of an officer to the army (R. *v.* Gardner, 2 Camp. 513; but see now The Army Act, 1881, s. 163, sub-s. *d*).

By **Statute**, the *Gazette* is expressly rendered evidence of various public matters. Thus, by the Documentary Evidence Act, 1868, s. 2, amended by the Documentary Evidence

Act, 1882, s. 2, the *Gazette* is made *primâ facie* evidence of any proclamation, order, or regulation issued by Her Majesty, the Privy Council, or any of the principal departments of State. So, by the Bankruptcy Act, 1883, s. 132, sub-s. 1, a copy of the *London Gazette* containing any notice inserted therein in pursuance of the Act, is evidence of the facts stated in the notice; and the production of such copy containing any notice of a receiving, or adjudication order is conclusive evidence of the validity and date of such order even against persons not parties to the bankruptcy proceedings (*Ex parte* Learoyd, 10 Ch. D. 3, Powell, 347). This does not apply, however, to proceedings impeaching the adjudication (*Ex parte* Geisel, 22 Ch. D. 436). So, Orders in Council under the Extradition Act, 1870, become, on being published in the *London Gazette*, conclusive evidence that the arrangements therein referred to comply with the Act, and that the Act applies to the foreign State mentioned in the Order (s. 5).

As to *Gazette* notices of dissolutions of partnership, see Tay. s. 1666; and generally as to the admissibility of newspapers to prove knowledge, *ante* p. 64.

The *Gazette* will, as we have seen, be judicially noticed on its mere production (*ante* p. 9), provided the entire paper and not a mere cutting is shown (R. *v.* Lowe, 15 Cox 286). But where a *Gazette* was made evidence of certain facts, if it "purported to be printed by the Queen's printer, or by the Queen's authority," a gazette purporting to be printed merely "by authority" was rejected (R. *v.* Wallace, 10 Cox 500. *Aliter*, perhaps, had evidence been given that it was the *Gazette* in which such matters were usually published, or had the particular authority mentioned been proved, *id.* and see R. *v.* Randnitz, 11 Cox 360).

CHAPTER XXXI.

PUBLIC REGISTERS.

OFFICIAL registers are admissible in proof of the facts recorded when (1) the book is required by law to be kept for public information or reference; and (2), the entry has been made promptly, and by the proper officer.

Principle.—The principle upon which entries in a register are received depends on the *public duty* of the person who keeps the register to make such entries after *satisfying himself of their truth*; it is not that the writer makes them contemporaneously, or of his own knowledge, for no person in a private capacity can make such entries (Doe *v.* Andrews, 15 Q. B. 756, *per* Erle, J.; and see Sturla *v.* Freccia, 5 App. Cas. 623, 644, *per* Lord Blackburn; and Lyell *v.* Kennedy, 56 L.T. 647, *per* C.A.)

[Tay. ss. 1591–1595, 1774–1780; Ros. N. P. 124–129, 209–216; Powell, 357–364; Steph. art. 34; 2 Phil. Ev. 10th ed. 143; Hubbuck, Ev. of Succ. 469–583, where the subject is treated at length; Whart. ss. 639–660.]

(1) **Public Authority and Benefit.**—There must be a legal duty to keep the register for the benefit or information of the public; registers kept under private authority, or for the benefit or information of private individuals, are inadmissible (Henry *v.* Leigh, 3 Camp. 499; R. *v.* Debenham, 2 B. & Ald. 185; Huntley *v.* Donovan, 15 Q. B. 96; Merrick *v.* Wakley, 8 A. & E. 170; Irish Society *v.* Derry, 12 C. & F. 641; Sturla *v.* Feccia, *supra*).

Examples of the former are *parish registers*, which are receivable as being kept formerly under the canon law, which is part of the common law, and now under the authority of statute.

Examples of the latter are *Nonconformist*, and other *non-parochial registers* which, until the present reign, were not kept under legal authority, and could only be received in evidence if admissible upon other grounds (*e.g.*, as declarations by deceased persons in the course of duty, *ante*, p. 178). By 3 & 4 Vict. c. 92 and 21 & 22 Vict. c. 25, however, many thousands of such records kept by Quakers, Presbyterians, Methodists, Baptists, Independents, and some Roman Catholic and Unitarian congregations were rendered receivable in evidence upon proof of *deposit with the Registrar-General and entry in his list* and upon previous notice to the opposite party of the intention to use them (see Tay. s. 1503, note 5); though where the provisions of these statutes have not been complied with, as in the case of the Jews, and many Roman Catholic prelates who have refused to part with their registers, these old records will still be inadmissible as public documents. The same difficulty does not arise with regard to the proof of births, marriages, and deaths of Nonconformists since 1836, or of burials since 1864, the former being registered under the General Registration Act, 1836 (6 & 7 Will. IV. c. 86), amended by the Births and Deaths Registration Act 1874 (37 & 38 Vict. c. 88); and the latter under the Registration of Burials Act, 1864 (27 & 28 Vict. c. 97), amended by the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41).

Foreign registers are evidence of matters properly and regularly recorded therein when proved to the satisfaction of the judge to have been kept under the sanction of public authority and to be recognised by the tribunals of their own country (Lyell *v.* Kennedy, 14 App. Cas. 437; Abbott *v.* Abbott, 29 L. J. P. & M. 57, Tay. s. 1593).

Colonial registers are also receivable upon proof that they are required to be kept by the law either of their own or of this country (Tay. s. 1593).

(2) **Proper Officer. Promptness.**—The entries must be made by, or under the direction of, the person whose duty it is to make them at the time (Doe *v.* Bray, 8 B. & C. 813).

Thus, where entries in the books of a public office had been made not by some specific person in the discharge of his official duty, but indiscriminately by any of the clerks in the office, they were rejected (Henry *v.* Leigh, 3 Camp. 499). So, where a baptism had been performed by a minister,

an entry of it made in the parish register after his death by his successor was held inadmissible (Doe *v.* Bray, *supra*, though the entry in this case was made from the information of the parish clerk who had been present).

But where the ceremony has been performed by a substitute, the entry may, it seems, be made either by the substitute (Zouche Peerage, Hubb. 482) or by the incumbent (Doe *v.* Andrews, 15 Q. B. 756). And entries in a parish register by a parish clerk will be presumed to have been made under the sanction of the minister (Doe *v.* Bray, *supra;* Chandos Peerage, Hubb. 482) although his private memoranda of the event are inadmissible, as it is not his duty to make them (*ibid.*).

Where the practice was for a registrar to sign the entries, unsigned entries, though in his handwriting, were rejected (Fox *v.* Bearblock, 17 Ch. D. 429; and see Lancum *v.* Lovell, 6 C. & P. 437); *aliter* if there was no such practice (Lauderdale Peerage, 10 App. Cas. 692, 706).

The entries should also be made *promptly*, or at least without such long delay as to impair their credibility. Thus, an entry made more than a year after the event has been rejected (Doe *v.* Bray, *supra;* Farrell *v.* Maguire, 3 Ir. L. R. 187, cited *ante*, p. 178). Special provision is made by the Registration Act, 1874, s. 38, as to entries made more than three or twelve months respectively after the event (see *infra*).

(3) **Originality. Errors. Interest.**—It is not essential that a register should be a strictly *original document*, for such a rule would exclude nearly all the early parish registers which were in general mere copies (Walker *v.* Wingfield, 18 Ves. 443). Accordingly, a parish register which was transcribed every three months from a day-book wherein the entries had been made immediately after the events, has been received, although the day-book, which differed from it, had been rejected, the reason assigned being that there could not be two parish registers (May *v.* May, 2 Stra. 1073; Lee *v.* Meecock, 5 Esp. 177; but see R. *v.* Head, Pea. Ev. 92 *n.*; *post*, p. 245). So, the *verified copies* of registers of baptisms and burials made by the clergy of the Church of England, under 52 Geo. III. c. 146, and required to be annually sent by them to the registrar of the diocese, are themselves regarded as original public documents, and

provable by copies (Walker *v.* Beauchamp, 6 C. & P. 552; A.-G. *v.* Oldham, cited Burn on Parish Registers, 209), as are, also, the *Bishop's transcripts* made before that Act and under the authority of the Canon Law (*id.*, Hubb. 496–502), and the *duplicate registers* of marriages kept under 6 & 7 Will. IV. c. 86.

Errors, erasures, alterations, and minor irregularities affect the weight and not the admissibility of the entries (Lyell *v.* Kennedy, 14 App. Cas. 437; Hubb. 485–488; *post*, Corporation Books; as to the correction of errors in registers kept under the Registration Act 1836, see s. 44). So, also, the fact that the entry is in the *interest* of the officer or body keeping the register (Irish Society *v.* Derry, 12 C. & F. 641; Sturla *v.* Freccia, 5 App. Cas. 623, per Lord Blackburn.

(4) **Of what Facts Registers are Evidence.**—A register is evidence of the particular transaction which it was the officer's duty to record, even though he had no personal knowledge of its occurrence (Doe *v.* Andrews, 15 Q. B. 756). Thus, entries made by an incumbent of parish burials reported to, but not performed by, him are admissible (*id.*); so, of entries of births and deaths under the Registration Act, 1836, s. 38, as amended by the Births and Deaths Registration Act, 1874, s. 38.

Entries of matters which it was *not* his duty to record—*e.g.*, entries in a parish register of baptisms or marriages performed in a neighbouring parish (Lyell *v.* Kennedy, *supra*; and see Farrell *v.* Maguire, 3 Ir. L. R. 187, *ante*, p. 178), or by a predecessor in office (Doe *v.* Bray, 8 B. & C. 813), are inadmissible.

It is doubtful how far a register can be received to prove *incidental particulars* concerning the main transaction, even where these are required by law to be included in the entry. If such particulars are necessarily within the knowledge of the registering officer they will doubtless be admissible (Doe *v.* Barnes, 1 M. & R. 386), otherwise they seem to be evidence only when expressly made so by statute (Huntley *v.* Donovan, 15 Q. B. 96).

Thus, a *register of birth* has been held to be evidence only of the fact of birth before the entry, but not of its *date* (*Re* Wintle, L. R. 9 Eq. 373. R. *v.* Weaver, L. R. 2 C. C. R. 85, proceeds upon a contrary assumption, though the point

was not raised; and Mr. Taylor considers the former case a dangerous precedent to follow implicitly, s. 1775, *n.* 4; in America, also, the opposite has been held, Derby *v.* Salem, 30 Vt. 722; Stoever *v.* Whitman, 6 Binney 416; and see Carskadden *v.* Poorman, 10 Watts 82). It is evidence of the *place* of birth where this fact has been added under the direction of the Registrar-General (7 Will. IV. and 1 Vict. c. 22 s. 8). Entries in registers under the Acts of 1836 and 1874, must purport to be signed by the person bound to inform the registrar thereof, or to be made in pursuance of the provisions of the latter Act as to the registration of births at sea; and further requirements exist when the entries are made more than three or twelve months respectively after the event (see s. 38 of the latter Act).

A *register of baptism* is evidence of the date and place of baptism (Hubb. 493), but not of the date or place of *birth* (R. *v.* Clapham, 4 C. & P. 29; Wiken *v.* Law, 3 Stark. 63; Burghardt *v.* Angerstein, 6 C. & P. 690), though if it were proved *aliundè* that the child was very young at the former date, the register might afford presumptive proof of its birth in the parish in which it was baptised (R. *v.* North Petherton, 5 B. & C. 508; R. *v.* Lubbenham, 5 B. & Ad. 968; R. *v.* St. Katherine, *id.* 970 *n.*; R. *v.* Crediton, 27 L. J. M. C. 265). In *In re* Turner, Glenister *v.* Harding, 29 Ch. D. 990, Chitty, J., held (on the authority of two *nisi prius* cases, Cope *v.* Cope, 1 M. & R. 269, and Morris *v.* Davis, 3 C. & P. 215) that on questions of pedigree this strictness might be relaxed, and the register taken as evidence of birth. The Court of Appeal has, however, since decided, in a pedigree case, that a certificate of baptism is no evidence of age (Robinson *v.* Buccleuch, Sol. Jour. vol. xxxi. p. 329; 3 Times L. R. 472; and see Steph. art. 34 *n.* 2.)—A *register of marriage* is evidence of the fact and date of marriage (Doe *v.* Barnes, 1 M. & Rob. 386; R. *v.* Hawes, 1 Den. C. C. 270).—A *register of death* is evidence of the *fact* of death, and of the *place*, where this is added under the direction of the Registrar-General (7 Will. IV. and 1 Vict. c. 22, s. 8). But *quære* of the *date*, as to which the decisions, *supra*, upon the date of birth in a birth register would seem to apply. Entries in registers of death under the Acts of 1836 and 1874 must purport to be signed by the person bound to inform the registrar thereof, or to be made upon a coroner's certificate, or in pursuance

of the provisions of the latter Act as to the registration of deaths at sea; and further requirement exists where the entry is made more than twelve months after the event (s. 38 of the latter Act).—A *register of burial* kept under the Registration of Burials Act, 1864, is "evidence of the burials therein recorded" (s. 5). The entry is required to be made by the registering officer upon the certificate of the person in charge of the burial (Burial Laws Amendment Act, 1880, s. 10). A register of burial is generally evidence of the facts of death and burial (Hubb. 184, 193) but not of the date of death (*id.*), nor of the age of the deceased (Robinson *v.* Buccleuch, *supra*).

Identity.—The identity of the parties named in the register must always be proved independently, sufficiently to satisfy the jury—*e.g.*, by calling the minister, clerk, attesting witness, or others present; or by proof of their handwriting, even without the production of the original register; or by the help of photographs (Ros. N. P. 124). The mere similarity of names has been held sufficient evidence of identity, for where the jury are satisfied the Court will not interfere (Hubbard *v.* Lees, L. R. 1 Ex. 255; *contra*, Miller *v.* Wheatley, 28 L. R. Ir. 144, in which, however, the last-named case was not cited).

The following are some of the principal documents which are admissible or not as official registers:—

Admissible.	*Inadmissible.*
Registers of Birth, Marriage, Death, &c. Parish Books.	
Old English parish registers (kept under canon law) of baptisms and burials before 1812, and of marriages before 1837 (Doe *v.* Barnes, 1 M. & Rob. 386).	The Fleet, King's Bench, May Fair, and Mint registers of baptisms and marriages (Reed *v.* Passer, 1 Esp. 213; Doe *v.* Gatacre, 8 C. & P. 578). These registers are deposited under, but expressly excepted from, 3 & 4 Vict. c. 92.
Parish registers of baptisms and burials kept under 52 Geo. III. c. 146 (1812), which is still in force.	
Old English non-parochial registers of births, baptisms, marriage, deaths, and burials kept by various religious denominations, and deposited under 3 & 4 Vict. c. 92; 21 & 22 Vict. c. 25 (*supra*, p. 218).	Old English non-parochial registers of births, &c., not deposited under the above Act (Whittuck *v.* Waters, 4 C. & P. 375; *Ex parte* Taylor, 1 J. & W. 483).

Admissible.	*Inadmissible.*
Civil registers of births and deaths kept under 6 & 7 Will. IV. c. 86, amended by 1 Vict. c. 22, and by the Births and Deaths Registration Act, 1874.	
Registers of marriages kept under the two first-mentioned Acts; the minister of the parish registering Church of England marriages; the secretary of the synagogue, Jewish marriages; and the registering officer of the Quakers, Quaker marriages; all other marriages being required to be performed in the presence of, and registered by, the district registrar.	
Registers of burials in *any* burial-ground in England, kept under 27 & 28 Vict. c. 92, amended by 43 & 44 Vict. c. 41.	
Irish Registers of marriages, kept under 7 & 8 Vict. c. 81, amended by and incorporated with 26 & 27 Vict. c. 27; 33 & 34 Vict. c. 110; and 36 & 37 Vict. c. 16; and of births and deaths kept under 26 & 27 Vict. c. 11 s. 5 Ir.	Irish registers of baptisms, marriages, &c., kept before the Acts referred to opposite (Stockbridge *v.* Quicke, 3 C. & K. 305; Roscommon Peerage, 6 C. & F. at 105; Miller *v.* Wheatley, 28 L. R. Ir. 144. As to their admissibility on other grounds, see *ante*, Declarations in Course of Duty).
Scotch parish registers of baptisms, &c., kept before 1854 (Lyell *v.* Kennedy, 14 App. Cas. 437, these are admissible on the same footing as foreign registers); and Scotch registers of births, marriages, and deaths kept under 17 & 18 Vict. c. 80 s. 58; and of irregular marriages kept under 19 & 20 Vict. c. 96, s. 2.	Gretna Green marriage registers (Bain *v.* Mason, 1 C. & P. 203, *note;* Nokes *v.* Milward, 2 Add. 386; Patrickson *v.* Patrickson, L. R. 1 P. & D. 86).
Colonial registers of births, marriages, and deaths, kept under local law (Coode *v.* Coode, 1 Curt. 755; Evans *v.* Bell, 38 L. T. 141).	
Registers of baptisms (Q.-P. *v.* Fry, 4 P. D. 230), marriages (Ratcliffe *v.* Ratcliffe, 1 S. & T. 467), and deaths in India, kept under authority of the E. I. Co., and now deposited in the office of the	Registers of baptisms in Guernsey (Huet *v.* Le Mesurier, 1 Cox Ch. 275. In Coode *v* Coode, *supra*, however, Dr. Lushington intimated that proof was not given, as it might have been, in the first-mentioned case, that Guernsey was part of the diocese of Winchester, and that by ancient custom a register was required to be kept there).

Admissible.	*Inadmissible.*
Secretary of State for India. These registers are themselves copies. Registers of marriages kept under 14 & 15 Vict. 40, ss. 21 and 22; this Act was repealed by the Statute Law Revision Act, 1875, and the registration of marriages, &c., is now regulated by Indian Acts.	
Registers of births, marriages, and deaths on British ships at sea, kept under 17 & 18 Vict. c. 140 s. 282, are admissible "saving all just exceptions" (which leaves open the question of their admissibility as evidence of the facts recorded, Ros. N. P. 129); and of births and deaths, kept under 37 & 38 Vict. c. 88, s. 37, which repeals the former Act, so far as the registration of births and deaths happening after 1874 is concerned.	
Consular registers of British marriages abroad since 1849, kept under the Foreign Marriages Acts 1849 to 1891.	
Foreign registers of births, marriages, and deaths abroad, kept under local public authority (Lyell *v.* Kennedy, *supra*, the case of a Scotch register; Perth Peerage, 2 H. L. C. 865; the case of a French register before the revolution: Abbott *v.* Abbott, 29 L. J. P. M. & A. 57, the case of a Chilian register).	Ambassador's registers of baptisms kept at the Embassy Chapel in London (D'Aglie *v.* Fryer, 13 L. J. Ch. 398); and a similar register of marriages kept at the Embassy Chapel in Paris (Leader *v.* Barry, 1 Esp. 353; Athlone Peerage, 8 C. & F. 262; Dufferin Peerage, 2 H. L. C. 47).
Bishops' registers have been admitted to prove a right of nomination to a curacy (Arnold *v.* Bishop of Wells, 5 Bing. 316); vicarial endowments (Tucker *v.* Wilkins, 4 Sim. 262); collations (Irish Society *v.* Derry, 12 C. & F. 641); the date of foundation of a deanery (R. *v.* St. Peter's, 12 Ad. & E. 512).—So, an enrolment-book of episcopal leases being a public muniment, has been allowed as secondary evidence of a lease (Humble *v.* Hunt, Holt	

Admissible.

N. P. 601;) and a register of chapter leases as evidence of reputation respecting the boundary of a parish (Coombs *v.* Coether, M. & M. 398, *ante*, p. 186). As to bishops' returns, first-fruits' books, and terriers (see *post*, p. 235).

Monastic registers have been received as secondary evidence of a lost grant or endowment, in support of ancient possession or Crown title (Bullen *v.* Michel, 2 Price 399; Williams *v.* Wilcox, 8 A. & E. 314; see Ros. N. P. 15, 212). And they seem also to have been admitted in a few early cases on questions of pedigree (Hubb. 567, *et seq.*).

Vestry books have been received to prove the election of a parish officer and its regularity (R. *v.* Martin, 2 Camp. 100; R. *v.* Pembridge, C. & M. 157; Hartley *v.* Cook, 5 C. & P. 441); and on the question of a right to a pew as reputation to prove repairs thereto (Price *v.* Littlewood, 3 Camp. 288; though in Sturla *v.* Freccia, 5 Ap. Cas. 646, Blackburn, L., doubted this, and also whether the entry there was of a sufficiently public nature to be receivable; intimating that it might be if it were intended for all parishioners who liked to come and see; see also Cooke *v.* Banks, 2 C. & P. 478, opposite).

An entry in a church-book made in 1678 as to an action decided 400 years previously, in which the parish was interested, held admissible as secondary evidence of the record which might be presumed to have been in existence at the time of the entry (Bidder *v.* Bridges, 34 N. R. 514; affirmed W. N. 86, 146).

Registers of Public Offices.

Registers and official records kept at the Inland Revenue

Inadmissible.

Vestry books have been rejected in favour of the parishioners to prove that they had a right concurrently with the rector to elect a parish officer, in the absence of proof that the rector was present at the meetings (Hartley *v.* Cook, *supra*); and they have been rejected as evidence of reputation to prove repairs to a pew on the ground that the entry related to a particular fact and not to a general right (Cooke *v.* Banks, *supra*).

An entry in a parish book by a parish officer as to the giving of a certificate whereby the parish was relieved from the support of a pauper, held not admissible because the entry was not of a public nature, but concerned merely the particular parish and its rights with relation to another; and also because the entry being private was self-serving (R. *v.* Debenham, 2 B. & Ald. 185; Irish Society *v.* Derry, 12 C. & F. 64, per Parke, B.).

Admissible.	*Inadmissible.*
Office (12 & 13 Vict. c. 1, s. 6, which office includes what were formerly the Excise Office, whose registers were also admissible: Fuller *v.* Fotch, Carth. 346; R. *v.* Grimwood, 1 Price 369; and the Stamp Office); those kept at the Patent Office (46 & 47 Vict. c. 57, s. 23), the Post Office, and many other Government offices (Tay. ss. 1595, 1775A, 1778). Post-marks are evidence of the dates, &c., appearing thereon (Ros. N. P. 122, 213). The books kept at the Bank of England are evidence to prove the transfer of stock (Mortimer *v.* McAllan, 6 M. & W. 58; Breton *v.* Cope, Pea. R. 30; Marsh *v.* Collnett, 2 Esp. 665).	
The books kept at public prisons have been held evidence of the dates of commitment and discharge of prisoners, but not of the cause of their detention (R. *v.* Aickles, 3 B. & P. 188; Salte *v.* Thomas, *id.* But *quære* whether they were properly admitted as public documents, there being a mere practice, but no legal duty, to keep the registers, the information being often derived from subordinates, and the gaoler keeping them chiefly for his own information and security. See Stark. Ev. p. 308; and Merrick *v.* Wakley, opposite).	An attendance register kept by the medical officer of a union under the orders of the Poor Law Commissioners, and intended to operate as a check upon himself, held inadmissible, the entry not being of a public nature (Merrick *v.* Wakley, 8 Ad. & E. 170; Irish Society *v.* Derry, 12 C. & F. 641, *per* Parke, B.).
Minute-books of meetings of creditors, kept under the Bankruptcy Act, 1883, and signed by the chairman either of that or of the next ensuing meeting, are evidence of the validity both of the meetings and the resolutions passed (s. 133, sub-s. 1 and 2), and of the correctness of the chairman's decision on all incidental questions arising thereat (*In re* Indian Zoedone Co., 26 Ch. D. 70).	A register of bankruptcy certificates, kept under the old law in the office of the Secretary of Bankrupts, but not under the orders of the Lord Chancellor or any public authority; and the entries in which were made indiscriminately by any of the clerks in the office as mere private memoranda for the information of inquirers, held inadmissible (Henry *v.* Leigh, 3 Camp. 449).
Registers and enrolments of	The books of the clerks of

Admissible.

deeds and wills in Yorkshire (47 & 48 Vict. c. 54, ss. 9, 20, 21), and Middlesex (7 Anne, c. 20, ss. 6, 12, 19). The registrar's certificates of registration and enrolment are evidence of the fact and date of those events, and that the necessary formalities have been complied with (Doe *v.* Lloyd, 1 M. & G. 684); but not of the *validity* of the deed, *e.g.*, that the necessary majority of assents to a composition deed had been obtained (Hare *v.* Waring, 3 M. & W. 379), except in the case of Crown deeds enrolled in the Land Revenue Office under 2 Will. IV. c. 1 (see s. 26).

Registers of voters under the Ballot Act, 1872, are conclusive as well upon the returning officer as upon the Court for the trial of election petitions, of the qualification of the persons named, except where they are prohibited from voting by law (Stowe *v.* Joliffe, L. R. 9 C. P. 734). Poll-books, or office copies thereof, are also evidence in all courts of law (6 & 7 Vict. c. 18, s. 94).

Maritime and Military Registers.

The books of the Sick and Hurt Office, kept by a public officer under the authority of the Admiralty, and the register and muster books of the Navy Office, similarly kept, are evidence of the fact, and date, of the death of a sailor (Wallace *v.* Cook, 5 Esp. 117; R. *v.* Rhodes, 1 Lea. 24; Barber *v.* Holmes, 3 Esp. 190; and see Huntley *v.* Donovan, 15 Q. B. 96, 100); the latter books are also evidence of the ship to which he belonged and the amount of wages due to him (R. *v.* Fitzgerald, 1 Lea. 20; R. *v.* Rhodes, *supra*).

The Custom House copy of the searcher's report, produced by

Inadmissible.

markets, kept formerly under 47 Geo. III. (sess. 2), c. 68, s. 29, have been held no evidence of the sales therein recorded, although expressly made evidence by the statute "touching all matters done in pursuance of the Act" (Brown *v.* Capel, M. & M. 374).

A Duchy Book, kept *temp.* Eliz., and purporting to be written by an officer of the Duchy of Lancaster, and preserved and treated as authentic in the Duchy Office, has been rejected to prove the duties of the office as described therein (Jewison *v.* Dyson, 2 M. & Rob. 377).

A shipping entry at the Custom House, made from a note

Admissible.	*Inadmissible.*
the proper officer, is evidence of the shipment of the goods specified (Johnson *v.* Ward, 6 Esp. 48; see also Tomkins *v.* A.-G., 1 Dow. 404).	supplied by the shipper, though admissible as a public document for the purpose of entitling the party to the privilege of sailing, is not admissible as secondary evidence of a lost note on a charge of fraud against the shipper unless the original be proved to have been made or presented by him (Hughes *v.* Wilson, 1 Stark. 179. In R. *v.* Grimwood, 1 Price 369, however, an excise book transcribed from the maltster's specimen-paper was held evidence against the latter on a question of fraud).
The registers of merchant ships are now, by the Merchant Shipping Act, 1854, s. 107, and the Amendment Act, 1855, s. 15, made *primâ facie* evidence of the matters contained, *e.g.*, of nationality (R. *v.* Bjornsen, 34 L. J. M. C. 180); ownership (Hibbs *v.* Ross, L. R. 1 Q. B. 534, including *primâ facie* liability of owners for the acts of those in charge, *id.*); and tonnage (The Recepta, 14 P. D. 131).	The registers of merchant ships under the old Acts were not evidence between private persons for private purposes, except as admissions; though they were evidence for the public purposes of the Acts (Tinkler *v.* Walpole, 14 East 226; Reusse *v.* Mayers, 3 Camp. 475; Flower *v.* Young, *id.* 240; Fraser *v.* Hopkins, 2 Taunt. 5; Pirie *v.* Anderson, 4 Taunt. 652; Cooper *v.* South, *id.* 802; and see M'Iver *v.* Humble, 16 East 169, 174; Stark. Ev. 310).
Passenger lists, kept under an old statute (Richardson *v.* Mellish, Ry. & M. 66); and crew lists of the vessels cleared at the Custom House of New York (R. *v.* Castro, cited Ros. N. P., 129), are evidence of the particulars stated.	Lloyd's Register of Shipping was rejected by Denman, C.J., in Freeman *v.* Baker, 5 C. & P. 482; but admitted in Bain *v.* Case, 3 C. & P. 496; and Abel *v.* Potts, 3 Esp. 242. For a description of this book, see Kerr *v.* Shedden, 4 C. & P. 531 *n.*
	The Sound List of vessels arriving at foreign ports transmitted by the British consuls to the merchants at home, and publicly exhibited by the latter, are inadmissible (Roberts *v.* Eddington, 4 Esp. 88).
The log-book of a man-of-war is evidence of the time of sailing and the motions of the fleet (Disraeli *v.* Jowett, 1 Esp. 427), provided it is produced as an official public book from the	The log-books of merchant vessels (whether official, ship's, or engineer's logs) are only evidence *against*, but not *for*, the owners or writers; though they may, of course, be used to refresh

Admissible.

Admiralty, otherwise it can only be used to refresh the writer's memory (Rundle *v.* Beaumont, 4 Bing. 537; Burrough *v.* Martin, 2 Camp. 112). In Heathcote's divorce, 1 Macq. S. C. H. of L. 277, it was held admissible, but insufficient to prove the whereabouts of ship's officer at a given time.—An official letter written at the conclusion of a voyage by the captain of a convoy and produced by the Admiralty, has also been held evidence of the facts stated (Watson *v.* King, 4 Camp. 275).

Coastguard, lighthouse, and lightship journals are admissible in the Court of Admiralty to prove the state of wind and weather at a given time [Maria das Dores, 32 L. J. P. M. & A. 163; The Catherina Maria, L. R., 1 A. D. & Ecc. 53; The Viatka (C. A. 1883), cited Pritch. Adm. Dig. 454;—though said by Dr. Lushington in the first case not to be books of such a public nature as would be admissible at common law on their mere production from proper custody].

Regimental registers and records, kept in pursuance of any statute, or of the Queen's regulations, or of military duty, and purporting to be signed by the commanding or other officer, whose duty it is to make them, are evidence of the facts stated (Army Act, 1881, s. 163, sub-s. 1 (*g*), as are certified copies thereof, sub-s. 1 (*h*); Tay. ss. 1604A and 1605).

Inadmissible.

the memory or contradict the statements of a witness (The Earl of Dumfries, 10 P. D. 31; The Sociadada, 1 W. Rob. 311; Pritch. Adm. Dig., p. 438; *ante*, "Admissions by Agents," p. 144).

University and College Books.

University and college books are admissible to prove degrees conferred and other collegiate proceedings (Tracy Peerage case, Min. Ev. 68; Moises *v.* Thornton, 8 T. R. 306, 307; Collins *v.*

To prove the marriage of a fellow of a college—the practice being for entries in college books to be made and signed by the registrar—*un*signed entries relating to the marriage, though in

Admissible.	*Inadmissible.*
Carnegie, 1 A. & E. 695; Hubb. 534; and see *post*, Corporation Books). Where the practice has been not to sign the entries, unsigned entries are receivable (Lauderdale Peerage, 10 App. Cas. 692).	a deceased registrar's handwriting, held inadmissible (Fox *v.* Bearblock, 17 Ch. D. 429; *post*, Corporation Books).
Professional Lists and Calendars.	
The Army List, purporting to be published by authority, and either to be printed by a Government printer or to be issued by H.M. Stationery Office, is evidence of the rank, appointments, and corps of the officers named [Army Act, 1881, s. 163, sub-s. (*d*)].	Navy lists, clergy lists, university calendars, peerages, directories, court guides, and similar unofficial publications, are not admissible (Tay. s. 1785; Hubb. 700-703).
The Law List, purporting to be published by the authority of the Commissioners for Inland Revenue, is *primâ facie* evidence of the solicitors and conveyancers named therein being duly certified (23 & 24 Vict. c. 127), but not of the date of their certificates (Raven *v.* Steven, 3 Times L. R. 67); and the absence of a name is *primâ facie* evidence of non-qualification (R. *v.* Wenham, 10 Cox 222). The Roll of Solicitors, kept at the Incorporated Law Society, is also admissible, and may be proved by certified extract under the hand of the secretary of the Society (Tay. s. 1639).	
The Medical Register, published by the General Council of Medical Education, or a certified copy of an entry in the general or local register, is similarly admissible (21 & 22 Vict. c. 90, s. 27); —so, also, registers of dentists (41 & 42 Vict. c. 33, ss. 11, 29); chemists (15 & 16 Vict. c. 56, s. 7; 31 & 32 Vict. c. 121, s. 13); and veterinary surgeons (44 & 45 Vict. c. 62, ss. 3, 9). [Tay. s. 1638.]	

CHAPTER XXXII.

PUBLIC INQUISITIONS, SURVEYS, ASSESSMENTS AND REPORTS.

INQUISITIONS, surveys, assessments, and the like are admissible in proof of their contents when made under public authority, and in relation to matters of public interest or concern.

Principle.—The general ground of reception is that such documents contain the results of inquiries made under competent public authority and concerning matters in which the public are interested (2 Phil. Ev. 10th ed. 125; Tay. s. 1767; Hubb. 589; Sturla *v.* Freccia, 5 Ap. Cas. 623; see also *ante*, "Public Registers").

The public documents included in this article have, for convenience, been treated under the head of exceptions to the hearsay rule; although many of them partake as much of the nature of opinion evidence or judgments, as of hearsay as hitherto defined. Thus they resemble judgments *in rem* (*post*, 279) in being receivable against strangers, but are distinguishable not only in seldom affording conclusive evidence of the matters determined, but in being in many instances founded on unsworn testimony.

The importance of ancient inquisitions, extents, and surveys has greatly diminished since the abolition of writs of right, and the passing of modern Statutes of Limitation; they are, however, still occasionally of value, especially in matters of pedigree, questions respecting the right of church patronage, or the existence and amount of a *modus*, and peerage claims (Tay. s. 1767).

[Tay. ss. 1674, 1767–1773, 1777; 2 Phil. Ev. 125 *et seq.*; Hubb. Ev. of Succ. 584–606; Stark. Ev. 284–291, 404–408; Ros. N. P. 194–196.]

(1) **Public Authority.**—There must be a judicial or quasi-judicial duty to inquire by a public officer (Sturla *v.* Freccia, *supra*, *per* Lord Blackburn; Lord Selborne uses the expression "legal jurisdiction to inquire under public authority;" Parke, B., in Irish Society *v.* Derry, 12 C. & F. 641, speaks of a "public duty to inquire").

(2) **Public Matter or Purpose.**—The matter inquired into must be of a public nature, or required to be ascertained for a public purpose; Parke, B., *supra*, speaks of a "public matter" and "entries of a public nature"; Sudgen, L.C., in Welland *v.* Middleton, 11 Ir. Eq. 604, uses the expression "public purpose," as does Lord Selborne in Sturla *v.* Freccia, *supra*; Lord Blackburn in the latter case states that "the very object of the inquiry must be that it should be made for the purpose of keeping its result public, so that the persons concerned may make use of it, and have access to it afterwards"; in 2 Phil. Ev. 10th ed. 125, it is said "in some cases inquisitions relate to private affairs, *e.g.*, the particulars of the pedigree or estate of a deceased person; still, if the inquiry has been made with a view to ascertain the rights of the Crown in regard to such matters, the inquisition is to be considered of a public nature for the purposes of evidence."

Inquisitions made under public legal authority, but for private purposes, may, however, be receivable between parties and privies as in the nature of judgments (*post*); and even if taken under private authority merely, they may still be receivable as admissions (Earl *v.* Lewis, 1 Esp. 1; Pollard *v.* Scott, Pea. R. 19; Wakeman *v.* West, 7 C. & P. 479; but see Phillips *v.* Hudson, 2 Ch. Ap. 243).

(3) **Excess of Jurisdiction. Irregularity. Interest.**—If the inquiry be *ultra vires* (Evans *v.* Taylor, 7 A. & E. 617; Latkow *v.* Eamer, 2 H. Bl. 437; Glossop *v.* Pole, 3 M. & S. 175; Powis Peerage, cited Cruise on Dign. c. 6, s. 60); or if the inquisition has been vacated, or there has been any irregularity in the proceedings (Powis Peerage, *supra*), the evidence will be rejected.

An inquisition, however, which is only voidable and not void, is receivable (Leighton *v.* Leighton, 1 Str. 308); so, irregularity may be cured by proof that the inquisition has been acted on, for the Court will then presume in favour of its regularity (Hubb. 591).

The fact that the return operates in the interest of the officer making it, affects weight and not admissibility (Irish Society *v.* Derry, *supra*; Sturla *v.* Freccia, *supra*, *per* Blackburn).

EXAMPLES.

Admissible.	*Inadmissible.*
Inquisitions in lunacy are admissible, but not conclusive, evidence of that fact even against strangers (Faulder *v.* Silk, 3 Camp. 126; Hassard *v.* Smith, I. R. 6 Eq. 429; and see Tay. s. 1674, and cases).	A Board of Trade inquiry under the Merchant Shipping Act, 1854, resulting in the suspension of a master's certificate on the ground of negligence, is inadmissible to prove such negligence in an action against the owners, although by s. 18 of the Act made *primâ facie* evidence of the truth of the matters stated (M'Allum *v.* Reid, L. R. 3 Ad. & E. 57 *n.*). As to *wreck inquiries* under the same Act, see Nothard *v.* Pepper, 17 C. B. N. S. 37; The Little Lizzie, L. R. 3 A. & E. 56.
A coroner's inquest, *super visum corporis*, is admissible, but not conclusive of the fact found (Garnett *v.* Ferrand, 6 B. & C. 611; see R. *v.* Gregory, 15 L. J. M. C. 38; and Jones *v.* White, 1 Str. 68).	
Inquisitions *post mortem*, taken under Royal or statutory authority, and upon oath, as to the possessions, heirs, &c., of deceased Crown tenants *in capite*, are admissible, but not conclusive, evidence of the particulars stated (Rowe *v.* Brenton, 3 M. & Ry. 164; and see fully Hubb. 584–606. These inquisitions ceased to be taken in 1660).	
An inquisition, taken under a warrant from the Exchequer, held evidence to show whether a prior or the Crown was seised of lands (Tooker *v.* Beaufort, 1 Burr. 146); but a return to a commission not signed or sealed is inadmissible, for *non constat* it was not a draft (Slane Peerage, 5 C. & F. 24).	
An inquisition taken under an order from the House of Commons held conclusive of the amount of fees payable in a public office (Green *v.* Hewett, 2 Peake, N. P. C. 182).	
The Domesday Book (*temp.* William I.), compiled under Royal authority, upon the oaths	Ordnance survey maps are inadmissible on questions of boundaries or private title (4

Admissible.

of sheriffs and others,—is evidence of the tenure of land, and various other particulars stated. This is the earliest public inquisition or survey extant (See Tay. s. 1768).

The Down Survey (*temp.* Charles II.) is by statute made conclusive evidence of certain boundaries, and is *primâ facie* evidence of other particulars between all persons (Archbishop of Dublin *v.* Trimleston, 12 Ir. Eq. R. 251; Tisdall *v.* Parnell, 14 Ir. L. R. N. S. 1).

The Book of Distributions, although only an abstract of the above, is also admissible as compiled under public authority, and preserved in a public office (Poole *v.* Griffith, 15 Ir. L. R. N. S. 239, 280; Spaight *v.* Twiss, 14 Ir. L. R. N. S. 516).

An extent of Crown lands, purporting to have been taken by the King's steward under 4 Edw. I. stat. 1, and preserved in a public office,—is evidence of the matters recorded (Rowe *v.* Brenton, 3 M. & Ry. 164; Doe *v.* Roberts, 13 M. & W. 520; Smith *v.* Brownlow, L. R. 9 Eq. 241).

Inquisitions and surveys of manors belonging to the Duchies of Cornwall and Lancaster (while the Dukes had sovereign rights) are evidence of the manorial customs and boundaries (Beaufort *v.* Smith, 4 Exch. 450; Daniel *v.* Wilkin, 7 Exch. 429; Mayor of Manchester *v.* Lyons, 29 Ch. D. at 299. In Smith *v.* Brownlow, *supra*, they were also received as evidence of reputation).

Parliamentary surveys (*i.e.*, surveys of Church and Crown lands made by commissioners

Inadmissible.

& 5 Vict. c. 30. s. 12; Swift *v.* McTiernan, 11 Ir. Eq. 602; Tisdall *v.* Parnell, *supra;* Bidder *v.* Bridges, 34 W. R. 514, affirmed W. N. 1886, p. 148); or to explain a deed of conveyance (Wyse *v.* Leahy, 9 Ir. C. L. 384). In Caton *v.* Hamilton, 53 J. P. 504, they were admitted as evidence of the position of a private boundary fence (since removed) at the time of the survey, *sed qu.*

Tithe commutation maps (under 6 & 7 Will. IV. c. 71) are inadmissible to prove title to land, although by s. 64 made "satisfactory evidence of their accuracy" (Wilberforce *v.* Hearfield, 5 Ch. D. 709). Such maps are evidence between parties concerned as to tithe apportionment (Hammond *v.* Bradstreet, 10 Ex. R. 390; Giffard *v.* Williams, 38 L. J. Ch. 597).

A survey and report defining, *inter alia*, the boundaries of a *Duchy* manor, and made under 4 Edw. I. stat. 1, by a deputy surveyor general, *temp.* Eliz.,—held inadmissible, the statute giving no power to ascertain boundaries (Evans *v.* Taylor, 7 A. & E. 617).

A survey made by the commissioners of the Earl of Leicester of lands then his own, but afterwards becoming Crown lands, held inadmissible as made under private authority (Daniel *v.* Wilkin, 7 Ex. 429. This survey was preserved in a public office.

A grant and survey of a Crown manor made *temp.* Edw. IV., and preserved in the Augmentation Office, was rejected in Phillips *v.* Hudson, 2 Ch. App. 243, as being merely a private document taken for the purposes of the Crown

Admissible.	*Inadmissible.*
during the Commonwealth) are evidence of the matters stated, though only taken under the *de facto* authority of a usurper (Rowe *v.* Brenton, *supra;* Freeman *v.* Read, 4 B. & S. 174).	(*sed qu.*, if relating to the possessions of the Crown).
Ecclesiastical terriers (*i.e.*, returns of the temporal possessions of the church in every parish), are evidence of the matters stated, being made under the authority of the 87th Canon (see Stark. Ev. 289–293; 2 Phil. Ev. 120; Tay. s. 1772).—So, the *Valor Beneficium* of 1291 (known as Pope Nicholas' Taxation) is admissible as a public document to prove the value of the benefices mentioned (Bullen *v.* Michel, 2 Price 477); but not whether tithes were taken in kind or by a *modus* (Short *v.* Lee, 2 J. & W. 486).—So, the *Valor Beneficium* of 26 Hen. VIII. (*ibid.*; and Drake *v.* Smyth, 5 Price 377. See also 2 Eagle on Tithes, 402, 403).	A survey made by direction of Oliver Cromwell, when Lord General of the Parliamentary forces, of lands granted to him by Parliament, held inadmissible as made under private authority (Beaufort *v.* Smith, *supra*).
A bishop's returns in obedience to writs from the Exchequer, stating the vacancies, &c., in his diocese, are admissible as statements by a public officer in discharge of a public duty. So his returns as to first-fruits; and the entries in the first-fruits books are admissible as secondary evidence of the returns (Irish Society *v.* Derry, 12 Cl. & F. 641; Sturla *v.* Freccia, 5 Ap. Cas. 623).	
An incumbent's returns in answer to inquiries by his bishop, for the information of the governors of Queen Anne's bounty, are admissible as in the nature of an inquisition in a public matter (Carr *v.* Mostyn, 5 Ex. 69).	
Herald's Visitation Books (made under the authority of Royal commissioners and upon sworn testimony between the	Herald's Books of Benefactors' Pedigrees, kept in pursuance of a Royal commission empowering the Heralds to raise funds for

Admissible.

years 1528 and 1688), are evidence of the pedigrees, &c., of the nobility and others. So the book of funeral certificates containing copies of the certificates given by the Heralds after attending, in the course of their duty, the funerals of great men, are admissible as secondary evidence of the certificates (Sturla *v.* Freccia, *supra;* Ros. N. P. 212; Tay. s. 1769; and see fully Hubb. Ev. Suc. 538–566). In the above case Lord Blackburn pointed out that these books are admissible not merely in peerage claims, but at *nisi prius* as well.

Land Tax assessments are evidence of the assessment upon the person, and for the property named; and, perhaps, of occupation or seisin (Doe *v.* Seaton, 2 A. & E. 171; Doe *v.* Arkwright, *id.* 182 note; Doe *v.* Cartwright, 1 C. & P. 218; Rankerdorff *v.* Taylor, 4 Pet. 349; Johnson *v.* Thompson, 15 L. T. 437; Smith *v.* Andrews [1891], 2 Ch. 678).—Valuation lists of property in the metropolis are rendered conclusive evidence of the gross or rateable value of hereditaments for various purposes by 32 & 33 Vict. c. 67, s. 45. The Poor Law valuation in Ireland is admissible but not conclusive evidence of the value of land, being "a public document made for a public purpose" (Welland *v.* Middleton, 11 Ir. Eq. 603, *per* Sugden L.C.; Swift *v.* McTiernan, *id.* 602). — So, the rate-books of the Poor Law Unions in Ireland are *primâ facia* evidence of the liability of the person rated (Castlebar Guardians *v.* Lord Lucan, 13 Ir. L. R. 44). And poor-rate books in England are evidence of the occupation or ownership of the persons rated at any given time

Inadmissible.

the restoration of the college, and to enrol the pedigrees of the donors, held not admissible as public documents, the duty being not to investigate and report on the truth of such pedigrees, but merely to enrol such as were presented (Shrewsbury Peerage, 7 H. L. C. 14).—So, a *book of pedigrees*, which was merely a collection of private entries in the handwriting of a deceased Herald, but not an office book kept in the discharge of duty (*id.* 33).—So a book of "Arms and Descents of the Nobility," E. 16, kept by the Heralds distinct from the records, and not under Royal authority, or in the discharge of any duty (*id.* 24).

Admissible.

(Smith *v.* Andrews [1891], 2 Ch. 678; Blount *v.* Layard, *id.* p. 681*n.*, *per* Field, J.)

The reports of the searchers at the Custom House are evidence of the cargoes on board, being official documents made under statutory authority (Johnson *v.* Ward, 6 Esp. 48).

As to reports by judicial officers which are evidence only *inter partes*, but not against strangers, or as public documents, see *post*, p. 304.

Inadmissible.

A report by the master of a foreign ship as to its burden, &c., required to be filed in order to get the cargo landed, held inadmissible, as not being made by a public officer in the discharge of a public duty, but by a private individual for his own benefit (Huntley *v.* Donovan, 15 Q. B. 96).

The confidential report of a committee appointed by a public department of a foreign State, to ascertain the fitness of a candidate for a public office, is not receivable as evidence of the facts reported; such an authority not being a legal one for a public purpose, nor the matter inquired into one of a public nature (Sturla *v.* Freccia, 5 Ap. Cas. 623).

CHAPTER XXXIII.

OFFICIAL CERTIFICATES AND LICENCES.

THE certificates of public officers, intrusted by law with authority for the purpose, are evidence of the *facts* authorized to be certified, but not of extraneous matters. And where it is part of the duty of an official to supply *copies* of any record, or document, such copies are admissible as secondary evidence of the originals (Buller N. P. 229; Brown *v.* Thornton, 6 A. & E. 185); unless, however, expressly so made by statute, a certified *extract* from such document, or a certificate of its *effect or result*, is inadmissible (Finlay *v.* Finlay, 31 L. J. Mat. 140).

Principle.—The ground upon which such documents are admitted is that where the law has appointed a person to act for a specific purpose, it will trust him so far as he acts under its authority (B. N. P. 229; Brown *v.* Thornton, *supra;* and see Sturla *v.* Freccia, 5 App. Cas. 623).

[2 Phil. Ev. 10th ed. 157–159; Stark. Ev. 293–296; Tay. ss. 1610–1659, 1784–1784A; Ros. N. P. 213; Powell, 343–345].

At **Common Law**, a certificate of a mere matter of fact not coupled with matter of law, is generally speaking inadmissible, though given by a person in an official position, or even by the Sovereign under the sign-manual. If the person was bound to record the fact, the proper evidence is a copy of the record duly authenticated; but as to matters which he is not bound to record, his certificate being extra-judicial, is merely the unsworn statement of a private person and will be rejected (Tay. s. 1784). Some exceptions, however, have

been allowed to this rule on grounds of convenience, although the authorities relating thereto are neither uniform nor satisfactory.

By **Statute** a variety of matters have been rendered provable by the certificates of officials, either generally, or for the special purposes of given Acts; the certificates being sometimes made conclusive, and sometimes *primâ facie*, evidence of the matters certified.

EXAMPLES.

Admissible.

The King's certificate under the sign-manual, authorizing the release of a prisoner, is evidence of the legality of the discharge (R. *v.* Miller, 1 Lea. 74; R. *v.* Gully, *id.* 98).

The licence of the Pope during his supremacy in this country is evidence of an impropriation (Cope *v.* Bedford, Palm. 427); so, the *Pope's Bull* is evidence that monastic lands were tithe free at the time of the dissolution of the monasteries (Lord Clanricard's case, Palm. 38).

The heralds' funeral certificates are evidence of the matters of pedigree stated therein (Sturla *v.* Freccia, 5 App. Cas. 623; Hubb. Ev. of Succ. 565).

A passport granted by an English Secretary of State has been held evidence that the person described therein was abroad at a given date (Whaley *v.* Carlisle, 17 Ir. C. L. R. 792).

A bishop's certificate of ordination is evidence of holy orders (R. *v.* Bathwick, 2 B. & Ad. 639); and in cases of dower his certificate of marriage is conclusive (Ilderton *v.* Ilderton, 2 H. Bl. 156); as is his certificate that a chapel is licensed for marriage (7 & 8 Vict. c. 56, s. 2).

A minister's certificate of a

Inadmissible.

The King's certificate under the sign-manual of a mere matter of fact, is inadmissible (Ormichund *v.* Barker, Willes 550; Berkeley Peerage case, Times, June 27, 1891, in which a letter or certificate of the Prince Regent, written when the Regency Act was in force, was rejected in proof of certain facts known to him, and relating to the pedigree of the claimant. The document appears to have been written by the Prince in his private capacity and *post litem motam*).

An officer's certificate is not evidence of the military service, &c., of a subordinate (Robinson *v.* Buccleuch, Sol. Jour. vol. xxxi. 329; 2 Phil. Ev. 159; see, however, as to registers, &c., kept under the Army Act, 1881, *ante*, p. 229).

The certificate of a commissioner of Excise as to the accuracy of the Excise books, is inadmissible (Dunbar *v.* Harvie, 2 Bli. 351).

The certificate of the rector or professors of a university is not evidence of the grant of a diploma (Moises *v.* Thornton, 3 Esp. 4); or of attendance at college lectures (Sewell *v.* Corp, 1 C. & P. 392).

A minister's certificate of a

Admissible.

marriage performed by him was admitted by Parke, B., at *nisi prius*, on the ground that it was part of the transaction though the register was rejected (Stockbridge *v.* Quicke, 3 C. & K. 305, *sed qu.* The ground stated is not satisfactory, and the case was doubted in Miller *v.* Wheatley, 28 L. R. Ir. 144. See *ante*, Declarations in Course of Duty, examples *a*, p. 178). — A certificate of a Japanese marriage given by the secretary of the governor before whom it was performed was admitted in Brinkley *v.* Att.-Gen., 15 P. D. 76, but the leave of the Court had been obtained, and the Att.-Gen. consented. — A certificate may of course be admissible if tendered as secondary evidence of the register; and it would be receivable in a case of pedigree if proved to have been acknowledged by a deceased relation, Hubb. 258.

The certificate of the Secretary of State for India is evidence that an Indian official is entitled to administer oaths, and the Court will take judicial notice of a signature so authenticated (Ferguson *v.* Benyon, 16 W. R. 71). — So, that of a judge or clerk of a foreign Court (*Re* Lambert, L. R. 1 P. & D. 138; Levitt *v.* Levitt, W. N. 1884, p. 78); or of a foreign notary (*Ex parte* Worsley, 2 H. Bl. 275; Omealey *v.* Newell, 8 East 364; Cole *v.* Sherard, 11 Ex. 382; Abbott *v.* Abbott, 29 L. J. P. & M. 57; *Ex parte* Magee, 15 Q. B. D. 332), is evidence that a foreign official is similarly entitled.

A notarial certificate is also evidence of the protest abroad of a foreign bill of exchange (Bayley on Bills, 490; Geralopulo *v.* Wieler, 10 C. B. 690); or

Inadmissible.

marriage performed by him was rejected in Nokes *v.* Milward, 2 Add. 386; and see Farrell *v.* Maguire, 3 Ir. L. R. 187, cited *ante*, p. 178; and Hubb. 258.

A notarial certificate has been rejected as evidence of the presentment in England of a foreign bill (Chasmer *v.* Noyes, 4 Camp. 129); or of the due execution of

Admissible.	*Inadmissible.*
that an affidavit has been duly sworn before him abroad (Davis' Trust, L. R. 8 Eq. 98; *Re* Lambert, *supra*; and see Annual Practice Notes to O. 38 r. 6); or that a power of attorney has been duly executed in a British colony (Armstrong *v.* Stockham, 24 L. J. Ch. 176; Hayward *v.* Stephens, 36 L. J. Ch. 135).	a deed in a foreign country (*Ex parte* Church, 1 D. & R. 324); or in a British colony (Nye *v* Macdonald, 39 L. J. P. C. 34).
A consular certificate has been received to prove that a certain person held the office of notary abroad (Haggitt *v.* Ineff, 24 L. J. Ch. 120; and see now the Commissioner for Oaths Acts, 1889 and 1891, *ante*, Judicial Notice, p. 9). It is also made evidence of certain facts connected with marriages solemnised before him under the Foreign Marriages Act, 1849, s. 17).	A consular certificate is not evidence of the amount realised by the sale of goods at a foreign port, although the consul is required by law to superintend the sale (Waldron *v.* Coombe, 3 Taunt. 162).
As to a certificate of the personal service of a writ by a foreign process server, see Ford *v.* Mieseke, W. N. 1885, p. 198.	The certificate of Lloyd's agent abroad is not receivable to prove the amount of damage done to goods at a foreign port, even against a subscriber (Drake *v.* Marryat, 1 B. & C. 473).
The following are some of the principal matters provable by certificate under various statutes:—	
Previous conviction or acquittal of indictable offences may be proved by the certificate of the clerk, or other person having the custody of the records, or their deputy; the certificate to contain "a copy of the indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts" (14 & 15 Vict. c. 99, s. 13). A previous *conviction* of any indictable offence may, for the purpose of discrediting a witness, be proved by a certificate containing the substance and effect only of the indictment and conviction, and signed as above (28 & 29 Vict. c. 18, s. 6); and a previous conviction of any indictable offence may also be proved for any purpose, in a	

Admissible.

similar manner to that last mentioned; and any *summary conviction* may be proved by a copy of such conviction purposing to be signed by the justice, or the officer of the court, or the clerk or other officer of any court to which such conviction has been returned (34 & 35 Vict. c. 112, s. 18; Tay. s. 1613).

Dismissal of charges at Petty Sessions, may, in addition to other modes, be proved as follows:—By a copy, certified by the justices, of the order dismissing any charge of an indictable offence (42 & 43 Vict. c. 49, s. 27, the dismissal to have the same effect as an acquittal on a trial or indictment); or any charge of an offence heard summarily out of sessions (11 & 12 Vict. c. 43, s. 14).

The dismissal of charges of assault may be proved by the justices' certificate stating the fact of such dismissal (24 & 25 Vict. c. 100, ss. 42, 43; which operates to release the defendant from all proceedings, *civil* or *criminal*, for the same cause, s. 45; *post*, Judgments).—Such certificate must be made on the merits and in presence of both parties (Reed *v.* Nutt, 24 Q. B. D. 669); it should specify the grounds of dismissal; it should be given within a reasonable time after the hearing, if not before the judges separate; and to operate as a bar, must be specially pleaded (Tay, s. 1616).

Incorporation of Joint Stock Companies.—The Registrar's (or his deputy's) certificate, under his official seal, is "*conclusive* evidence that all the requisitions of the Act in respect of registration have been complied with" (Companies Act, 1862, ss. 18, 192; Peel's Case, 2 Ch. App. 674, 681;

Inadmissible.

Admissible.

Oakes *v.* Turquand, L. R. 2 H. L. 325, 354, 369; Shakelford *v.* Dangerfield, L. R. 3 C. P. 407; *Re* Nassau Phosphate Co., 2 Ch. D. 610; Ros. N. P. 1157; Lindley, Company Law, 111; it is not, however, conclusive that the Memorandum of Association has been signed by the requisite number of persons, *Re* National Debenture Corporation, C. A. W. N. 1891, 83).

Proprietorship of Shares. — A certificate under the common seal of the company is *primâ facie* evidence of the title of a member to the shares specified (Companies Clauses Consolidation Act, 1845. s. 12; Companies Act, 1862, s. 31).

Patents, Designs, and Trade Marks. —A certificate purporting to be given by the Comptroller-General of Patents, &c., "as to any entry, matter, or thing which he is authorized by that Act, or by any general rules made thereunder, to make or do, shall be *primâ facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone" (The Patents, &c., Act, 1883, s. 96).

Registration and Enrolment of Deeds and Wills. in Yorkshire, may be proved by the certificate, under seal, of the registrar (47 & 48 Vict. c. 54, s. 9); and in Middlesex by his certificate of enrolment, not under seal (7 Anne, c. 20, ss. 6, 9). These certificates are generally evidence of the fact and date of the registration or enrolment (Doe *v.* Lloyd, 1 M. & G. 684; but in the case of deeds relating to the possession of the Crown, enrolled in the Land Revenue Office, they are also evidence of the due execution of the deed, 2 Will. 4, c. 1,

Inadmissible.

Admissible.	*Inadmissible.*
s. 26). Certificates of *searches* are also admissible under the above Acts. As to the effect of registration see further, *ante*, p. 227; and Ros. N. P. 142, 209; and Tay. ss. 1645–1648. *Registration of British Ships.* —The registrar's certificate is *primâ facie* evidence of the matters contained or endorsed (Mer. Shipping Act 1854, s. 107). [For a fuller list of Statutory Certificates, see Tay, ss. 1611–1659].	

CHAPTER XXXIV.

CORPORATION, COMPANY AND BANKERS' BOOKS.

ENTRIES in the public books of a corporation, made by the proper officer, are at common law evidence of the official acts and proceedings of the corporation even against strangers.

The books must have been publicly kept as the corporation books (Shrewsbury *v.* Hart, 1 C. & P. 114); and the entries made by the usual officer or his substitute (R. *v.* Mothersell, Stra. 93; and see Baker *v.* Cave, 1 H. & N. 674). Unsigned entries will be rejected (Fox *v.* Bearblock, 17 Ch. D. 429); unless there has been a usage not to sign them (Lauderdale Peerage Case, 10 App. Cas. 692, 700). So, where an entry required a stamp, an unstamped entry was rejected in favour of a loose paper, properly stamped, from which the entry had been transcribed, and which was held to be the only original and effectual act of the corporation (R. *v.* Head, Pea. Ev. 92, *n.*) Erasures will generally be presumed to have been made before the entries were signed (Steevens' Hospital *v.* Dyas, 15 Ir. Ch. R. 405).

Entries in the public books of a corporation as to *private matters*, and entries in private books, are only receivable as admissions against the corporation (Brett *v.* Beales, M. & M. 419; Hill *v.* Manchester Waterworks, 5 B. & Ad. 866), or members who have acquiesced in them (Hill *v.* Manchester Waterworks, *supra;* Corp. of Waterford *v.* Price, 9 Ir. L.R. 310; Rooney's Case, 10 Jur. N.S. 790, 812; Hallmark's Case, 9 Ch. D. 329; Lindley's Company Law, 312; *ante*, pp. 63, 150). Private entries have, however, been received on questions of ancient possession, not as evidence of the facts stated, but to show acts of ownership, or to explain

local terms (Malcolmson *v.* O'Dea, 10 H. L. C. 593; *ante*, pp. 50, 57).

[Tay. ss. 1781–1783; Ros. N. P. 123, 214–215; Grant on Corporations, 317–319; Hubb. Ev. of Succession, 536–537; Whart, ss. 661–663].

EXAMPLES.

Admissible.	*Inadmissible.*
Entries relating to the following matters have been received as being of a public nature :—	Entries relating to the following mattters have been rejected as being of a private nature :—
The election, swearing in, disfranchisement, or restoration of a corporator (Symmers *v.* Regem, Cowp. 489; Brown *v.* Corp. of London, 11 Mod. 225); the customs of a corporation (Bruin *v.* Knott, 12 Sim. 436); and its bye-laws (Holdsworth *v.* Mayor of Dartmouth, cited Ros. N. P. 215).—So, on a question of pedigree, entries in the books of a corporation have been received to prove that a member was received by a certain description (Collins *v.* Maule, 8 C. & P. 405); or was ordained and despatched as a missionary abroad (Lauderdale Peerage, *supra*).	Proceedings against certain persons for refusing to pay toll (Brett *v.* Beales, M. & M. 419; London *v.* Lynn, 1 H. Bl. 214 *n.*; Marriage *v.* Lawrence, 3 B. & A. 142); a right to the ownership of a house (Corp. of Waterford *v.* Price, *supra*); or to the appointment of a curate (A.-G. *v.* Warwick, 4 Rus. 222); or to the exclusive privilege of trading in a given locality (Davies *v.* Morgan, 1 C. & J. 590).—So, to prove fraud or irregularity in the execution of a bond by a Corporation, their books have been rejected as evidence for them (Hill *v.* Manchester Waterworks Co., *supra*; Holdsworth *v.* Dartmouth, *sup.*)
See further as to University and College books, *ante*, p. 229.	

By Statute.—The books of corporations and public companies are frequently rendered admissible by statute in proof of their contents both as to public and private matters. Thus the minute-books authorized to be kept under the *Municipal Corporations Act*, 1882 (incorporated with the Local Government Act, 1888), s. 22, sub-s. 5, are receivable in evidence without further proof; and similar provisions exist as to the minute-books of *school boards* (Elementary Education Act, 1870, s. 38, sub-s. 4); and those kept under the *Public Health Act*, 1875.

The registers of companies, subject to the *Companies' Clauses Consolidation Act*, 1845, required by s. 9 to be sealed with the company's seal, and to contain the names and addresses of the shareholders, the shares (distinguishing

each by its number) held by them, and the amounts paid thereon, are, in actions for calls by the company made by s. 28, *primâ facie* evidence of the defendant being a shareholder and of the number and amount of his shares (see Portal *v.* Emmens, 1 C. P. D. 201, 212–213, per Lindley, J.); and by s. 98 the minute-books which are required to contain notes, minutes, or copies of the directors' appointments, contracts, orders, and proceedings of meetings, are, if signed by the chairman of such meetings, receivable in all courts as *primâ facie* evidence of the matters entered therein, of meetings having been duly convened and held, of the persons making or entering the orders, etc., being shareholders, directors, or members of the committee, and of the signature of the chairman, and the fact that he is such.

So, by the *Companies Act*, 1862, the register of members required by s. 25 to contain the names, addresses and occupations (if any) of the members; the shares (distinguishing each by its number) held by them; the amounts paid, or agreed to be considered as paid, thereon; and the dates of entry and cessation of membership, are *primâ facie* evidence of the matters directed or authorized by the Act to be inserted therein (s. 37). By s. 67 of the same Act, the minute-books required to contain minutes of all resolutions and proceeding of general meetings of the company and of its directors or managers, are, if purporting to be signed by the chairman of that or of the next meeting, receivable in all legal proceedings as *primâ facie* evidence, of such resolutions and proceedings, and of the meetings being duly held and convened and the resolutions duly passed, and of the validity of all appointments and acts of directors, managers, or liquidators, notwithstanding any defect afterwards discovered in the appointments or qualifications (York Tramways Co. *v.* Willows, 8 Q. B. D. 685). Moreover, the chairman of a general meeting, having *primâ facie* authority to decide all incidental questions which arise at such meeting and necessarily require decision at the time, the entry by him in the minute-book of the result of a poll, or of his decision of all such questions, is *primâ facie* evidence of such result and of the correctness of such decisions. [*In re* Indian Zoedone Co. 26 Ch. D. 70. Minute-books under the repealed Act of 1856, s. 40 of which is in similar terms to s. 67 *supra*, have been held evidence between shareholders, but not to

prove a party a shareholder, Fox's Case, 3 De G. J. & S. 465; and see Maguire's Case, 3 De G. & S. 31; and Clarke *v.* Imperial Gas Co. 4 B. & Ad. 315; but see also Arnot's Case, *infra.*] By s. 154, "where any company is being wound up, all books, accounts, and documents of the company (*e.g.*, an allotment book, *Ex parte* Kennedy, 44 Ch. D. 472), and of the liquidators, shall, as between the contributories of the company (or an alleged contributory, Arnot's Case, 36 Ch. D. 702), be *primâ facie* evidence of the truth of all matters purporting to be therein recorded." Minute-books of meetings of creditors under the Bankruptcy Act, 1883, s. 133, are similarly receivable (*ante*, p. 226). As to the admissibility of certificates of incorporation of companies, or of the proprietorship of shares therein, see *ante*, Certificates.

Informalities and Errors.—Where the Act requires a register to be sealed, an unsealed register is inadmissible (Birkenhead, &c., Co. *v.* Brownrigg, 4 Ex. 426; Cheltenham, &c., Co. *v.* Price, 9 C. & P. 55; Wolverhampton, &c., Co. *v.* Hawkesford, 11 C. B. N. S. 456); but otherwise clauses as to the mode of signing minutes, keeping registers, and making official returns, are considered as directory only; it being sufficient if the provisions of the particular Act are substantially complied with (Bain *v.* Whitehaven Ry. Co. 3 H. L. C. 1; East Gloucestershire Ry. Co. *v.* Bartholemew, L. R. 3 Ex. 15; Lindley's Company Law, 55, 105, 110). Thus, company books have been received notwithstanding the omission of a shareholder's address, or of the amount paid on the distinctive numbers of his shares; and an official return will be admissible although its heading may be inaccurate, or although it does not purport to be signed by the proper officer, or is signed at a wrong time (Lindley, 57–65, and cases cited).

A share ledger has been received as a register (Weikersheim's Case, L. R. 8 Ch. 831); as also a series of volumes, the last only of which, containing a recapitulation of the others, was sealed in accordance with the Act (Inglis *v.* G. N. R. 1 Macq. 112). On the other hand, a rough memorandum-book or paper containing the names of, and shares held by, a portion of the shareholders, although sealed, has been rejected as a register (Wolverhampton, &c., Co. *v.* Hawkesford, *supra:* see Lindley, 59, 105).

Corrections.—A company may correct errors in its own

register, at least such as the Court would authorize or compel the correction of (Hartley's Case, L. R. 10 Ch. 157; *Re* Etna Co., Ir. R. 7 Eq. 264); or it may be allowed or compelled to do so, either under statutory provisions to that effect (as in the Company Act, 1862, ss. 35, 98); or by mandamus (Lindley, 61–68, 120–125, 755).

Bankers' Books.—Copies of entries in bankers' books—*i.e.*, ledgers, day-books, cash-books, account-books, and all others used in the ordinary business of the bank—are receivable in all legal proceedings (for or against any one, Harding *v.* Williams, 14 Ch. D. 197), as *primâ facie* evidence of the entries, or of the matters, transactions, and accounts therein recorded, upon proof that (1) the book was, at the time of the entry, one of the ordinary books of the bank; (2) that it is in the custody or control of the bank; and (3) that the entry was made in the ordinary course of business (Bankers' Books Evidence Act, 1879, ss. 3 and 4).

Such proof may be given by a partner or officer of the bank, and either orally or by affidavit (s. 4).

The copy must be an examined copy, proved orally or on affidavit by some person who has examined it with the original entry (s. 5).

Production of Original Books.—No banker or officer of a bank is, in any legal proceedings to which the bank is not a party, compellable to produce the bank books, or to appear as a witness to prove their contents, unless by order of a judge for special cause (s. 6).

Inspection.—A Court or judge may, on the application of any party to a legal proceeding, empower such party to inspect and take copies of entries (even of the accounts of strangers, Howard *v.* Beall, 23 Q. B. D. 1), for the purpose of the proceedings (s. 7; see Parnell *v.* Wood, 1892, P. 137; Fitzpatrick *v.* McDonald, 30 L. R. I. 249).

Such order must, unless otherwise directed, be served upon the bank three clear days (exclusive of Sundays and bank holidays) before it is to be obeyed.

The Court has jurisdiction to make the order *ex parte*, but it should be exercised with care; it may also be made without any affidavit in support of the application—*e.g.*, where the materiality of the entries appears by the pleadings, but the inspection should be limited to the period covered by the matters in dispute (Arnott *v.* Hayes, 36 Ch. D. 731).

Meaning of "Bank."—The word "bank" is (by s. 9) restricted to (1) banks which have made a return to the Commissioners of Inland Revenue (such return may be proved by a copy verified by the affidavit of a partner or officer, or by producing a newspaper purporting to contain such copy published by the Commissioners); (2) Savings banks certified under the Acts relating thereto (such certification may be proved by an office or examined copy of the certificate); and (3) Post Office Savings Banks (proved to be such by the certificate of the Postmaster-General or one of his secretaries). But by 45 & 46 Vict. c. 72, s. 11, sub-s. 2, the word is extended to include any banking company to which the Companies Acts of 1862 to 1880 apply, and which the Registrar of Joint Stock Companies shall have certified to have furnished to him the list and summary with the addition specified by the Act.

CHAPTER XXXV.

PUBLISHED HISTORIES, MAPS, AND TABLES.

HISTORIES.—Approved public and general histories are said to be admissible, and in some old cases have been received, as in the nature of public documents or reputation, to prove ancient facts of a public, as distinguished from those of a private or local, nature.

As, however, the Court will take judicial notice of public facts affecting the government and constitution of the country, and may refer to accredited histories to satisfy itself of their existence (*ante*, pp. 8, 10), such books would seem to be more properly admissible in this sense than as evidence; and accordingly it has been held that, although counsel may in his speech refer to matters of general history as being within the common knowledge of the Court and jury, yet he may not cite particular works of history, ecclesiastical canons, or foreign treaties, to prove any fact relevant to the issue (Darby *v.* Ouseley, 2 Jur. N. S. 497; 1 H. & N. 1).

MAPS.—Mr. Justice Stephen submits that published maps generally offered for public sale are admissible to show the relative positions of towns and countries and other matters of geographical notoriety, and cites R. *v.* Orton, where it seems maps of Australia were received to show the situation of various places at which the defendant was alleged to have lived (art. 35). As to surveys taken under public authority, see *ante*, 231. Judicial notice will be taken of the geographical position and general names applied to districts in the Admiralty charts (Birrell *v.* Dryer, 9 App. Cas. 345, *per* Lord Blackburn).

TABLES.—The Carlisle Tables have been admitted to prove the average duration of life at a particular age, on proof that they were accepted as authoritative by insurance companies (Rowley *v.* L. & N. W. R. Co., L. R. 8 Ex. 221; approved in Garman *v.* Brighton Electric Co., Q. B. D. June 28, 1890, *ex relatione*). Mr. Wharton distinguishes between works of exact and those of inductive science, the former being, he states, admissible in America, the latter not (ss. 665–667). Scientific and professional treatises may, of course, be used to refresh the memory of experts (*post*, p. 263.)

Judicial notice will be taken of the *Almanac* annexed to the Common Prayer Book, as being part of the law of the land, but not of matters not contained therein—*e.g.*, the time of the rising or setting of the sun; nor is an almanac evidence of such matters (Tutton *v.* Darke, 5 H. & N. 647; Collier *v.* Nokes, 2 C. & K. 1012; *ante*, p. 10).

[Tay. s. 1785; Ros. N. P. 214; 2 Phil. Ev. 155–157; Powell 375, 376; Steph. art. 35; Whart. ss. 664–670].

EXAMPLES.

Admissible.

Speed's Chronicle has been admitted to prove the date of the decease of Isabel, Queen Dowager of Ed. II. (Lord Brounker *v.* Atkyns, Skin. 14; citing also Lord Bridgewater's case); and Prince Cantemir's History of the Ottoman Empire, to prove a universal custom of the Mahomedan religion (Warren Hastings' trial, cited 2 Phil. Ev. 123, and by Lord Ellenborough in Picton's Case, 30 How. St. Tr. 492).—So, it is said, chronicles have been admitted to prove the date of King Philip's assumption of the title of King of Spain (Neale *v.* Fry, 1 Salk. 281; but this does not appear in the reports, see Tay. s. 1785, note 1).

Inadmissible.

A public history has been rejected to prove ancient public facts—*e.g.*, the date of the abdication of Charles V. (Mossom *v.* Ivy, 10 How. St. Tr. 555), and the excommunication of Queen Elizabeth by the Pope (Darby *v.* Ouseley, *supra*).

So to prove private or local matters—*e.g.*, the Chronicles of Stowe and Dugdale to prove the creation of a peerage (Vaux Peerage, 5 C. & F. 526); Camden's Britannica, to prove a local custom to sink salt pits (Stainer *v.* Droitwich, 1 Salk. 281); Dugdale's Monasticon to prove that a certain abbey was an inferior abbey (*ibid.*, the original records being producible); Nichols's History of Brecknockshire to prove parish or county boundaries (Evans *v.* Getting, 6 C. &

Admissible.	*Inadmissible.*
	P. 586; Alderson, B., remarked, however, that "it was not like a general history of Wales.") And a public history has been rejected to prove that King Alfred founded a certain college (Cockman *v.* Mather, 1 Bernad. 14).

CHAPTER XXXVI.

REPUTATION, OPINION, AND BELIEF.

NEITHER the general reputation prevailing in the community, nor the opinions, inferences, or beliefs of individuals (whether witnesses or not), are admissible in proof of material facts.

Principle.—Evidence of this nature is sometimes said to be excluded by the hearsay rule; but it is in general inadmissible whether delivered on oath or not. The grounds more commonly assigned for its rejection are that opinions, in so far as they may be founded on no evidence, or illegal evidence, are worthless, and in so far as they may be founded on legal evidence, tend to usurp the functions of the tribunal whose province alone it is to draw conclusions of law or fact (Best, s. 511; Powell, 107).

Such evidence, however, is sometimes receivable for other purposes than to prove the existence of facts. Thus, as we have seen, reputation may be received when convertible with character (*ante*, p. 82); or as affording reasonable grounds for a party's belief (Sheen *v.* Bumstead, 2 H. & C. 193; *ante*, p. 65). So, books are admissible to show the opinions of their writers on a given subject, or the sense in which words are used; though such opinions cannot be made evidence of specific facts (Darby *v.* Ouseley, 1 H. & N. 1).

On the other hand, the prevalence of a public rumour or reputation is not admissible to bring home knowledge of its subject-matter to a specific individual (*ante*, p. 64); nor can a libel be justified by proof of the existence of rumours to the same effect as the libel (Lockhardt *v.* Jelly, 19 L. T. N. S. 659; and see Scott *v.* Sampson, 8 Q. B. D. 491; *ante*, p. 83).

To the rule excluding reputation and opinion in proof of material facts, there are some important exceptions.

REPUTATION.—General reputation is admissible to prove the existence of the facts mentioned below, partly by reason of the difficulty of obtaining better evidence in such cases, and partly because "the concurrence of many voices" among those most favourably situated for knowing, raises a reasonable presumption that the facts concurred in are true.

[Tay. ss. 577–578; Stark. Ev. 43–50, 186–190; Whart. ss. 252–256.]

(1) **Public and General Rights.**—The conditions of admissibility are the same as those governing hearsay on the same subject (*ante*, p. 183).

(2) **Pedigree.**—Family repute is receivable under the same conditions as hearsay on such questions (*ante*, pp. 195, 199).

(3) **Marriage.**—Except in cases of bigamy, divorce, and petitions for damages by reason of adultery, where stricter proof is required, evidence of general reputation (not confined to family repute) is admissible in proof of marriage (*ante*, pp. 53, 200; Steph. art. 53; Tay. s. 578). And it is not inadmissible because divided, discontinuous, or restricted to a particular class or locality, though these circumstances may impair its weight (Andrews *v.* Ulthwaite, 2 Times L. R. 895). But the testimony must be general; if it is based merely on the statements of some particular person, it ceases to be admissible as general reputation, and can only be tendered on a question of pedigree, and as the statement of a deceased relation (Shedden *v.* Patrick, 30 L. J. P. M. & A. 217; *ante*, p. 200).

(4) **Libel.**—To prove that a libel referred to the plaintiff, evidence that he was publicly jeered at in consequence of the libel is admissible (Cook *v.* Ward, 4 M. & P. 99). So, to prove that a caricature destroyed before the trial was meant to represent one of the parties, exclamations of recognition by spectators in a public picture gallery where the caricature was exhibited have been received (Du Bost *v.* Beresford, 2 Camp. 512).

OPINIONS OF EXPERTS.—The opinions of experts are admissible whenever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience.

When the subject is one upon which the jury is as capable of forming an opinion as the witness; or when the Court is assisted by Assessors, as in Admiralty cases involving questions of nautical skill (The Kestral, 6 P. D. 182; The Beryl, 9 P. D. 137; The Sir R. Peel, 4 Asp. 231; The Assyrian, 63 L. T. 91), the reason for the admission of such evidence fails, and it will be rejected.

It must be remembered that, in addition to the scientific evidence adduced by the parties, the Court may always, for its own guidance and information, in cases other than criminal proceedings by the Crown, order independent reports to be made or experiments to be tried by experts of its own selection, and may act on such reports. (Arbitration Act, 1889, ss. 13–14, repealing, but virtually re-enacting Jud. Act, 1873, ss. 56–57; see Case *v.* Midland Rail. Co., 27 Beav. 247; Badische *v.* Levinstein, 24 Ch. D. 156; Enderwicke *v.* Alden, L. T. vol. lxxxviii. p. 12; Weeds *v.* Ward, 40 Ch. D. 555; and O. 50, r. 3; O. 55, r. 19. As to medical inspection and reports in Nullity suits, see Dixon on Divorce, 2nd ed. p. 309.)

[Tay. ss. 1419–1425; Best, ss. 513–516; Ros. N.P. 174–175; Powell, 110–114; Steph. arts. 49–50; 1 Smith, L. C. (7th ed.) 555; Broom's Legal Maxims, 885–892; Whart. ss. 434–456.]

(1) **Subjects of Expert Testimony—Science, Art, Trade, Handwriting, Foreign Law.**[a]—*Science.* The opinions of medical men are admissible upon questions within their own province—*e.g.*, insanity (see examples), the causes of disease or death, the effects of poisons (see Browne and Stewart's Poison Trials), the consequence of wounds, the conditions of gestation (Gardner Peerage, Lemarch), the effects of hospitals upon the health of a neighbourhood (Met. Asylums District *v.* Hill, 47 L. T. 29); those of actuaries as to the average duration of life with respect to the value of annuities (Rowley *v.* London & N. W. Ry. Co., L. R. 8 Ex. 221); those of naturalists as to the ability of fish to overcome obstaeles in a river (Cottrill *v.* Myrick, 3 Fairf. 222); and so with other branches of science.—*Art.* The opinions of artists are admissible as to the genuineness (Belt *v.* Lawes, Times, Dec. 12 to 16, 1882), value or even perhaps decency (see the case of Rudolph Blind, tried at Bow Street, Times, April 29, 1892) of a work of art; those

of engineers as to the cause of obstruction to a harbour (Folkes *v.* Chadd, 3 Doug. 157); those of seal-engravers as to the impressions from a seal (*id.*); those of officers of a fire-brigade as to the cause of a fire (R. *v.* Haseltine, 12 Cox 404); those of military men as to a question of military practice (Bradley *v.* Arthur, 4 B. & C. 295), those of post-office clerks as to post-marks (Abbey *v.* Lill, 5 Bing. 299); those of ship-builders, marine surveyors and engineers as to the strength and construction of a ship (The Robin, [1892] P. 95), and (when the Court is not sitting with Assessors) those of nautical men as to the proper navigation of a vessel (Sills *v.* Brown, 9 C. & P. 604; Fenwick *v.* Bell, 1 C. & K. 312).—*Trade.* The opinions of shopkeepers are admissible to prove the average waste resulting from the retail sale of goods (McFadden *v.* Murdock, 1 Ir. R. C. L. 211); those of persons conversant with a market, to prove market value(Whart. ss. 440–450); and those of business men to prove the meaning of trade terms (Robertson *v.* Jackson, 2 C. B. 412; the witness, however, should first be asked whether there is any generally understood meaning attached to such words in the particular trade, before being asked what he understands by them, Curtis *v.* Peek, 13 W. R. 230; *post*, pp. 259, 270). It is doubtful whether the opinions of underwriters are receivable as to what facts are "material" in a policy of assurance, though the preponderance of opinion is in favour of their admission. The evidence was received in Chaurand *v.* Angerstein, Peake N. P. 43; Berthon *v.* Loughman, 2 Stark. 258; Elton *v.* Larkins, 5 C. & P. 392; Littledale *v.* Dixon, 1 B. & P., N. R. 151; Haywood *v.* Rogers, 4 East 590; Rickards *v.* Murdock, 10 B. & C. 527; Chapman *v.* Walton, 10 Bing. 57; and Ionides *v.* Pender, L. R. 9 Q. B. 531; but rejected in Durrell *v.* Bederley, Holt N. P. 283; Carter *v.* Boehm, 1 Smith L. C. 522; and Campbell *v.* Rickards, 5 B. & Ad. 840; see 1 Arnould's Marine Ins. 6th ed. pp. 592–593].—*Handwriting.* Experts may, as we have seen, give their opinions upon the genuineness of a disputed handwriting, whether ancient or modern, after having compared it with specimens proved to the satisfaction of the judge to be genuine (*ante*, pp. 48–49); and they may also without such comparison, but from their general knowledge of the subject, give their opinion as to whether the writing

is a in feigned or natural hand (R. *v.* Coleman, 6 Cox 163; Tay. ss. 1417, 1877, Best s. 246). So, their opinions are admissible as to the probable date of an ancient writing (Tracy Peerage, 10 C. & F. 191); or as to whether interlineations were written contemporaneously with the rest of a document (*re* Hindmarsh, L. R. 1 P. & D. 307).—*Foreign law* (which, except on appeals to the House of Lords, includes Scotch and Colonial law, Cooper *v.* Cooper, 13 App. Cas. 88) must, unless an opinion has been obtained under the statutory procedure mentioned below, be proved as a fact by skilled witnesses, and not as was at one time held, by the production of the books in which it is contained, for the Court is not competent to interpret such authorities. Codes and precedents, however, may be referred to by the witnesses in support of their views and the passages cited will then be treated as a part of their testimony. Moreover, where the evidence of the witnesses is conflicting or obscure, the Court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion (Nelson *v.* Bridport, 8 Beav. 527; Bremner *v.* Freeman, 10 Moo. P. C. 306; Di Sora *v.* Phillipps, 10 H. L. C. 624; Concha *v.* Murietta, 40 Ch. D. 543). *Foreign customs or usage* may be proved by any witness, whether expert or not, who is acquainted with the fact (Ganer *v.* Lanesborough, 1 Peake R. 18, explained by Lord Lyndhurst in the Sussex Peerage case, 11 C. & F. 124; Mostyn *v.* Fabrigas, 1 Cowp. 174; Vander Donckt *v.* Thellusson, 8 C. B. 812; thus any Jew is competent to prove a Jewish marriage custom, Lindo *v.* Belisario, 1 Hagg. C. R. 216). Foreign law and custom must be proved *on oath* and not by the mere certificates of experts: though in one or two cases this strictness has it seems been relaxed. (In the goods of Prince Peter Oldenburgh, 53 L. J. P. D. & A. 46; in the goods of Klingeman, 32 L. J. P. M. & A. 16; Brinkley *v.* A.-G. 15 P. D. 76, cited *ante*, p. 240; see, however, Tay. s. 1784, A.). And *previous decisions* upon the same point are not admissible, for being a question of fact it must be decided on evidence and not on authority (M'Cormick *v.* Garnett, 5 D. M. & G. 278; in addition to which law is continually liable to change). As to *foreign documents*, see *infra*, p. 259.

Statutory Procedure to ascertain Colonial and Foreign

Law.—By 22 & 23 Vict. c. 63, a case may be stated for the opinion of a Superior Court in any of *Her Majesty's Dominions* to ascertain the law of that part [see Lord *v.* Colvin, 1 D. & S. 24 (Scotch law); Login *v.* Princess of Coorg, 30 Beav. 632 (Bangalese law)]. And by 24 & 25 Vict. c. 11, a similar case may be stated for the opinion of a Court in any *Foreign State* with which Her Majesty may have entered into a convention for the ascertainment of such law. [This Act is practically a dead letter, as no convention has ever been made in pursuance of it.]

The testimony of experts is of course not confined to opinion evidence; they may, and frequently do, testify to matters of fact as well.

Their opinions, however, are not receivable on the following subjects:—

The Construction of Documents.—Questions of construction, whether of domestic or foreign documents, being matters of law and not of fact, belong exclusively to the Court, and the opinions of experts thereon are inadmissible (Di Sora *v.* Phillips, 10 H. L. C. 624; Stearine, &c., Co. *v.* Heintzmann, 17 C. B. N. S. at p. 60; Kirkland *v.* Nisbet, 3 Macq. Sc. App. 766; Dowling *v.* Pontypool, &c., Co., L. R. 18 Eq. 714). It is otherwise with *local, foreign, or technical terms*, in a document, which may always be explained by experts (*supra* p. 257; Kell *v.* Charmer, 23 Beav. 195; Goblet *v.* Beechy, 3 Sim. 24; Shore *v.* Wilson, 9 C. & F. 555; Whart. s. 972; *cf.* p. 270); unless they are such as are equally intelligible to ordinary readers; thus, the opinions of engineers are not admissible to show what matters are "delineated" upon statutory plans (Dowling *v.* Pontypool Co., *supra*). In order to aid the Court in construing foreign documents, it will generally require from experts a translation of the language, an explanation of the peculiar terms employed, and information as to any foreign law or rule of construction applicable to the case (Di Sora *v.* Phillips, *supra;* Stearine Co. *v.* Heintzman, *supra*).—*Professional conduct.* The opinions of experts are not receivable upon disputed points of professional duty, morality, or etiquette; except so far as they may be necessary to elucidate the rules of a profession (Ramadge *v.* Ryan, 9 Bing. 333; Greville *v.* Chapman, 5 Q. B. 731). Nor are their opinions, any more than those of ordinary witnesses, admissible upon *matters of legal or moral*

obligation, or as to *the manner in which other persons would probably have been influenced* had the parties acted in one way rather than another (Campbell *v.* Rickards, 5 B. & Ad. 846, *per* Lord Denman). So, the opinions of cattle-drovers are not admissible upon the question of how an accident to cattle in a railway truck must have happened (Smith *v.* Midland Ry. Co., 57 L. T. 13); nor those of jurymen as to what verdict they would have given had the evidence been different (Hatch *v.* Lewis, 2 F. & F. 475).

(2) **Competency and Credit.**—The competency of the expert is a preliminary question for the judge; though in practice considerable laxity prevails on the point, and the fact that the expert has not acquired his knowledge professionally goes merely to weight and not to admissibility. Thus, unqualified practitioners, hospital students, and dressers have been permitted to testify as *medical experts* (Best s. 516); so accountants familiar with the business of life insurance are competent as *actuaries* (Rowley *v.* L. & N. W. Ry. Co., L. R. 8 Ex. 221). And on question of *handwriting*, not only specialists, but post-office officials, lithographers and bank clerks have been permitted to testify as experts (R. *v.* Coleman, 6 Cox 162, Best s. 246); but not police inspectors or constables (R. *v.* Crouch, 4 Cox 163; R. v. Wilbain, 9 Cox 448; R. *v.* Harvey, 11 Cox 546). In *foreign law* the expert may be either a professional lawyer; or a person "peritus virtute officii," *i.e.*, the holder of an official situation which requires and therefore presumes legal knowledge (Sussex Peerage case, 11 C. & F. 85); or perhaps some other person who from his profession or business has had peculiar means of becoming acquainted with the law in question (Van der Donckt *v.* Thellusson, 8 C. B. 812).—The following have been held *competent*: A foreign judge, barrister, or solicitor practising in the courts of his own country (Tay. s. 1425; Bristow *v.* Sequeville, 5 Ex. 275); a colonial attorney-general, although a non-lawyer, as to the law of his colony (Sussex Peerage, *supra*: *per* Lord Brougham, at p. 124). A Roman Catholic bishop holding the office of coadjutor to a vicar apostolic in England, as to Roman marriage law (id. p. 117). A French vice-consul in England as to the commercial law of France (Lacon *v.* Higgins, 3 Stark. 178). A Persian ambassador, or secre-

tary of embassy, as to Persian law (in the goods of Dost Ali Khan, 6 P. D. 6. Ecclesiastics are the only professional lawyers in Persia, but diplomats are also required to know the law).—A Belgian merchant and commissioner of stocks and bills of exchange, as to the Belgian law affecting such bills. (Van der Donckt *v.* Thellusson, *supra*. Although this decision applies in terms to foreign law, the point involved was merely one of mercantile usage.) An English merchant, trading in Chili, as to the fact that a marriage register is required to be kept by Chilian law (Abbott *v.* Abbott, 29 L. J. P. M. & A. 57, *sed qu.*, and see Sussex Peerage *supra*). —The following have been held *incompetent*:—Prussian law cannot be proved by a jurisconsult at the Prussian embassy, who had no practical acquaintance with such law, but had studied it a Saxon university (Bristow *v.* Sequeville, *supra*); nor by an English barrister who had studied it in England (*Re* Bonelli, 1 P. D. 69).—Nor can Canadian law be proved by an English barrister practising before the Judicial Committee of the Privy Council in appeals from Canada (Cartwright *v.* Cartwright, 26 W. R. 682).—Scotch marriage law cannot be proved by a Scotch Roman Catholic priest (R. *v.* Savage, 13 Cox 178); or by a Scotch tradesman (R. *v.* Brampton, 10 East 287); or resident gentleman (Sussex Peerage, *supra*, overruling R. *v.* Dent, 1 C. & K. 197).

Credit.—The fact that the expert was not in a fit state of mind or health to form a proper opinion; or is interested, or corrupt; or has expressed a different opinion at other times, may be elicited in cross-examination, or, if denied, independently proved (Alcock *v.* Royal Exchange Insurance Co. 13 Q. B. 292; Tay. s. 1445; *ante*, pp. 86–89).

(3) **Scope of the Opinion. Hypothetical Questions.**[b]—An expert may give his opinion upon *facts* proved either by himself, or by other witnesses in his hearing at the trial, or upon *hypotheses* based upon the evidence.

But his opinion is not admissible upon materials which are not before the jury, or which have merely been reported to him by hearsay [R. *v.* Staunton, Times, Sept. 26, 1877, Tidy's Legal Medicine, 8, 17, 25; Gardner Peerage, Le Marchant, 75–80. So in America, opinions as to facts stated out of court, and hypothetical questions having no foundation in the evidence, are excluded, Heald *v.* Thing,

45 Me. 392; Muldowney *v.* Ill. C. Ry., 39 Iowa 615; Hurst *v.* C. R. I. Ry., 49 Iowa 76; *Re* Ames, 51 Iowa 596; People *v.* Aiken, 11 Am. St. Rep. 512, Whart. ss. 441, 451, 452, Chamberlayne's Best, note (*f*) to s. 511, Greenleaf, 14th ed. s. 440, note (*b*) to p. 531; in New York, however, the hypothetical question may be based on any possible or probable range of the evidence, Harnett *v.* Garvey, 66 N. Y. 641)]. And although on questions of professional skill he may state in a general form what would be the proper course to pursue under the circumstances proved (Sills *v.* Brown, 9 C. & P. 604; Chapman *v.* Walton, 10 Bing. 57; Rich *v.* Pierpoint, 3 F. & F. 35; Collier *v.* Simpson, 5 C. & P. 73), he may not be asked what his own conduct would have been under such circumstances (Berthon *v.* Loughman, 2 Stark. 258; Hatch *v.* Lewis, 2 F. & F. at 475; Ramadge *v.* Ryan, 9 Bing. 333; though the fact that has acted in accordance with his opinion may always be proved to enhance its weight, *infra*, p. 263, and examples (*c*)).

The cases are conflicting as to how far an expert may be asked the *very question which the jury have to decide;* but the weight of authority appears to be as follows:—(*a*) Where the issue involves other elements besides the purely scientific, the expert must confine himself to the former, and must not give his opinion upon the legal or general merits of the case (Seed *v.* Higgins, 8 H. L. C. 550; Jameson *v.* Drinkald, 12 Moore 148; Campbell *v.* Rickards, 5 B. & Ad. 840); (*b*) Where the issue is substantially one of science or skill merely, the expert may, if he has *himself* observed the facts, be asked the very question which the jury have to decide (Folkes *v.* Chadd, 3 Doug. 157; R. *v.* Layton, 4 Cox 149; R. *v.* Richards, 1 F. & F. 87; Martin *v.* Johnson, *id.* 122; Lovatt *v.* Tribe, 3 F. & F. 9, Tay. s. 1421). If, however, his opinion is based merely upon facts proved by *others*, such a question is improper, for it practically asks him to determine the truth of their testimony, as well as to give an opinion upon it (R. *v.* MacNaghten, 10 C. & F. 200; R. *v.* Frances, 4 Cox 57; Bainbrigge *v.* Bainbrigge, *id.* 457; Sills *v.* Brown, 9 C. & P. 604); the correct course is to put such facts to him *hypothetically*, asking him to assume one or

more of them to be true, and to state his opinion upon these (Fenwick *v.* Bell, 1 C. & K. 312; Malton *v.* Nesbit, 1 C. & P. 72; R. *v.* Frances, 4 Cox 57, Tay. s. 1421, Whart. s. 452); where, however, the facts are not in dispute it has been said that the former question may be put as a matter of convenience though not as of right (R. *v.* MacNaghten, *supra*; though this *dictum* was disapproved in R. *v.* Frances, *supra*).

(4) **Grounds of Opinion. Corroboration. Illustration.**[c]—In all cases in which opinion evidence is receivable, the grounds or reasoning upon which the opinion is based may be inquired into. This inquiry is usually reserved for cross-examination, and is, in some cases, inadmissible in chief—*e.g.*, the proper question to a valuer is, "What is the fair or market value?" in cross-examination, but not in chief, he may give his reasons, as that neighbouring land had sold for so much (Sheen *v.* Bumpstead, 1 H. & C. 358, *per* Bramwell, B.). So, witnesses called to impeach the general reputation for veracity of an adversary's witness may in cross-examination, but not in chief, state the grounds of their opinion (Steph. art. 133).

In addition to the above, facts, although otherwise irrelevant (Tay. s. 337, Steph. art. 50), and even the result of experiments made with special reference to the trial (R. *v.* Haseltine, 12 Cox 404), may be given in evidence in corroboration or illustration of the opinion.

(5) **Reference to Text-Books, Price Lists, &c.**—An expert may refer to text-books to refresh his memory, or to correct or confirm his opinion—*e.g.*, a doctor to medical treatises; a valuer to price lists, a foreign lawyer to codes, text-writers, and reports (Sussex Peerage case, 11 C. & F. 85, 114; Collier *v.* Simpson, 5 C. & P. 73; Tay. s. 1422). If he describe particular passages therein as accurately representing his views, they may be read as part of his testimony, though not as evidence, *per se* (*id.* Nelson *v.* Bridport, 8 Beav. 527; Concha *v.* Murietta, 40 Ch. D. 543. As to when the Court will construe such authorities for itself: see *ante*, p. 258. In Rowley *v.* London and N. W. Ry. Co., L. R. 8 Ex. 221, the Carlisle Tables were received as evidence *per se*; *ante*, p. 252).

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) In an action for libel, the question being whether A. had acted dishonourably in withdrawing his horse from a race after having bet against it, the rules of the Jockey Club not technically forbidding such a course;—the opinion of members of the Club as to the morality of such a proceeding, held admissible to explain the meaning of the rules (Greville *v.* Chapman, 5 Q. B. 731. Mr. Taylor remarks that it is not probable the Court would sanction any extension of the doctrine here propounded, s. 1420, *note* 3, p. 1212).	(*a*) In an action for libel, the question being whether Dr. A. in refusing on certain grounds to meet Dr. B. in consultation, had not honourably discharged his duty to his profession;—medical witnesses may not be asked (1) whether they would have met Dr. B. in consultation; or (2) whether Dr. A. had not honourably discharged his duty (Ramadge *v.* Ryan, 9 Bing. 333. Tindall, C.J., remarked that the answer to the latter question might depend altogether on the temper and peculiar opinion of the witnesses, and was a point on which the jury was as capable of forming an opinion as they; adding, that if any specific rules of the profession had been proved, the defendant might perhaps have shown that the plaintiff in violating them had rendered himself unworthy of the countenance of his brethren).
(*b*) The question being whether A.'s death was caused by poison;—medical witnesses who attended A. at the time of his death, or who assisted at the *post mortem*, or who analysed the remains, may give their opinions upon the point; so, also, a medical witness who has merely attended the trial and heard the facts proved by the former witnesses, provided such facts are put to him hypothetically (for detailed illustrations, see Browne and Stewart's Poison Trials).	(*b*) The question being as to the cause of A's death;—the opinion of a medical witness formed merely from reading a statement of the facts prepared by the solicitor of the party calling him, which statement included a transcript of the depositions taken before the magistrate and of the notes of the *post mortem* examination, is not admissible (see R. *v.* Staunton, Times, Sept. 26th, 1877). So a medical witness cannot be asked his opinion as to a case of protracted gestation which he had not personally attended but of which the patient had informed him some months afterwards (Gardner Peerage, Le March. 75–80; nor can the patient's statement itself be put in evidence by the witness, *id.* 169–176).

Admissible.	*Inadmissible.*
The question being whether a certain document was written by A. ;—an expert who has compared the document with a genuine specimen of A's writing produced at the trial, may give his opinion that both are written by the same person (*ante*, p. 48).	The question being whether a certain document was written by A. ;—an expert who has compared the document with a genuine specimen of A.'s writing *not produced* at the trial, cannot give his opinion that both are written by the same person (Fitzwalter Peerage case, 10 C. & F. 193 ; Arbon *v.* Fussell, 3 F. & F. 152; Tay. s. 1876); nor, even if produced, that both are written by A. (*see* Steph. art. 49, illustr. *d.*)
The question being whether A. has infringed B.'s patent ;—a scientific witness who has examined the rival inventions may give his opinion that they are identical in principle (Seed *v.* Higgins, 8 H. L. C. 550).	The question being whether A. has infringed B.'s patent ;—a scientific witness who has examined both inventions cannot give his opinion that there has been an infringement, for this is a question of mixed law and fact which must be decided by the tribunal (Seed *v.* Higgins, *supra* ; *ante*, pp. 24, 29).
The question being whether a medical man had negligently treated a patient ;—medical witnesses may be asked whether, assuming the facts proved to be true, they consider there was anything improper in the treatment described (Rich *v.* Pierpoint, 3 F. & F. 35; the first part of the question was not in this case put hypothetically as is the strictly proper course) ; or whether such treatment is sanctioned by books of authority (Collier *v.* Simpson, 5 C. & P. 73) ; or whether the result produced could have been avoided by proper care (Fenwick *v.* Bell, 1 C. & R. 312, the case of a nautical witness).	The question being whether a medical man had negligently treated a patient ;—a medical witness cannot be asked whether having heard the evidence he considers there has been a want of due care and skill (Rich *v.* Pierpoint, *supra*) ; nor whether, assuming the facts proved to be true, they show negligence (Malton *v.* Nesbit, 1 C. & P. 72 ; Jameson *v.* Drinkald, 12 Moore 148, cases of nautical witnesses) ; nor can he put in evidence medical works to show what treatment would be proper (Collier *v.* Simpson, *supra* ; see *ante*, p. 263, as to refreshing memory by such works).
The question being whether A. is insane ;—a medical witness who has personally examined A., may give his opinion that he is, or is not, insane (R. *v.* Layton, 4 Cox 149 ; R. *v.* Richards, 1 F. & F. 87 ; Martin *v.* Johnson, *id.* 122 ; Lovatt v. Tribe, 3 F. &	The question being whether A. is insane ;—a medical witness who has merely heard the evidence of other witnesses as to A.'s condition, cannot be asked whether "having heard the evidence he considers A. is or is not insane?" (R. *v.* MacNaghten, 10

Admissible.	*Inadmissib'e.*
F. 9).—If the witness has merely heard the evidence of others as to A.'s condition, he may be asked to take particular facts, and assuming them to be true, to give his opinion as to A.'s sanity (R. *v.* Frances, 4 Cox 57; R. *v.* Wright, R. & R. 456; R. *v.* Searle, 1 M. & R. 75); so, he may be shown a letter of A.'s and asked if such a letter is a rational one (Sharpe *v.* Macaulay, cited Powell Ev. 4th ed. 81); or whether a long fast followed by a draught of strong liquor (which had been proved) would be likely to produce a paroxysm of the disease in one suffering from it (R. *v.* Wright, *supra*).	C. & F. 200; R. *v.* Frances, *supra;* Bainbrigge *v.* Bainbrigge, 4 Cox 454); nor can he be shown a letter of A.'s and asked whether the writer could have been of sound mind (Sharpe *v.* Macaulay, *supra*).
The question being whether A. tried for murder, was incapable from insanity of judging between right and wrong;—a medical witness who has examined A., may give his opinion that the insanity from which A. suffers is of a kind that usually prevents people from judging between right and wrong (Steph. art. 49, illustr. (*b*), citing R. *v.* Dove, where, however, the question seems to have been put in a more direct and objectionable form, as was also the case in R. *v.* Higginson, C. & K. 129).	The question being whether A., tried for murder, was incapable from insanity of judging between right and wrong;—a medical witness who has examined A. cannot be asked whether A. was capable of judging between right and wrong (R. *v.* Layton, 4 Cox 149; *contra*, R. *v.* Higginson, *supra*, *sed qu.*); or was responsible for his acts (R. *v.* Richards, *supra*); or was guilty of murder (Jameson *v.* Drinkald, 12 Moore, 148).—So, in America, although an expert may testify in answer to a hypothetical question that he should consider the testator of sound mind, he cannot testify that he considered him competent to make a will (May *v.* Bradlee, 127 Ind. 414).
(*c*) In an action against the owners of a vessel for running down a tug;—the opinion of a marine insurance agent, who had examined the vessel and was called on behalf of the defendants, having been given to show how the collision occurred, the fact that though the tug was insured in the witness's office he had advised its owners not to	

Admissible.

sue the vessel, is admissible as strongly corroborating the truth of the opinion (Stephenson *v.* River Tyne Commissioners, 17 W. R. 590).—So, the opinion of underwriters and shipowners having been given as to the meaning of certain words in a charter-party, the fact that they regulated the voyages of their own vessels in accordance with such opinions is receivable (Birrel *v.* Dryer, 9 App. Cas. 345).

The question being whether an obstruction to a harbour was caused by a neighbouring sea-wall;—an engineer who has given his opinion in the negative may support it by proof that in some cases harbours along the same coast, but where there were no sea-walls, were similarly obstructed (Folkes *v.* Chadd, 3 Doug. 157; Metropolitan Asylum District *v.* Hill, cited, *ante*, p. 75).

The question being whether a deficiency in goods entrusted by a grocer to his shopman was due to the latter's dishonesty, or to the necessary waste from retail sales;—other grocers may give their opinions (1) as to the percentage of waste which may generally be expected from that class of shop and mode of dealing; (2) as to whether the deficiency in question would or would not be an excessive amount of waste under the particular circumstances proved; (3) the witnesses may illustrate their opinions by proof of similar deficiences from retail sales, in their own businesses (McFadden *v.* Murdock, 1 Ir. R. C. L. 211).

The question being whether A. died from strychnine poisoning;—experts who have given their opinions as to the symptoms of such poisoning, and that A.'s death was caused thereby,

Inadmissible.

(*c*) The question being whether an obstruction to a harbour was caused by a neighbouring sea-wall;—proof that some other harbours along the same coast where there were such walls had been similarly obstructed was rejected, as an attempt *litem lite resolvere* (Folkes *v.* Chadd, *supra*; Hawks *v.* Charlemont, 110 Mass. 110; and see *ante*, p. 75; and Com. *v.* Piper, *infra*).

Admissible.	*Inadmissible.*
may support such opinions by proof that other persons who were admittedly poisoned by strychnine had exhibited similar symptoms to A.'s; and experts whose opinion was that A. had, on the contrary, died from ordinary tetanus, may prove that other persons who admittedly died from the latter cause, had exhibited symptoms like A.'s [(R. *v.* Palmer, Steph. Hist. Cr. Law, iii. 389). Proof of this nature should only be admitted when the case is one of rarity, as were instances of strychnine poisoning at the date of Palmer's trial in 1856 (Steph. art. 50, *note*). The nature of new explosives may be shown by their effect on other persons or buildings injured at the same time (R. *v.* Bernard, 1 F. & F. 240; R. *v.* McGrath, 14 Cox 598)].	
The question being whether A. died from a certain poison;—experts may testify as to the results of experiments made by them upon various animals to illustrate the effects of such poison (R. *v.* Lamson, Browne and Stewart's Poison Trials, Steph. art. 54).—So, on a trial for arson, evidence of experiments, under similar conditions to those in question, made by an officer of the Fire Brigade since the commencement of the trial, is admissible to show the manner in which the building was probably ignited (R. *v.* Haseltine, 12 Cox 404). The experiments may sometimes be made before the Court (Bigsby *v.* Dickinson, 4 Ch. D. 24).	The question being whether A. murdered B. by striking him with a certain instrument;—evidence of experiments made by a mechanician with a similar instrument upon a dynamometer, is not admissible to negative the sufficiency of the instrument in question to cause death (Com. *v.* Piper, 120 Mass. 185; the Court remarked that such evidence tended not to assist, but to confuse and mislead the jury unless the experiments were made under the same conditions as those in question; see Folkes *v.* Chadd, *supra*; Hawks *v.* Charlemont, *supra*, and *ante*, p. 75).

OPINIONS OF NON-EXPERTS.—The opinion or belief of ordinary witnesses is admissible in proof of the following matters on grounds of necessity, more direct and positive evidence being frequently unattainable:—

Identity.—In Fryer *v.* Gathercole, 13 Jur. 542, Parke, B., remarked, "in the identification of persons you compare in your mind the man you have seen with the man you see at the trial. The same rule belongs to every species of identification."

Handwriting.[a]—The genuineness of a party's handwriting, or mark, may be similarly proved, the standard of comparison being either some specimen document produced at the trial and proved to the satisfaction of the judge to be genuine (*ante*, p. 48), or, an exemplar formed in the mind of the witness from his *previous knowledge* of the party's handwriting. Such knowledge (which is generally assumed in examination-in-chief) may be acquired:—(1) *By having at any time seen the party write*, though the value of the opinion will, of course, vary with the frequency and recentness of the occasions and the attention paid to the matter by the witness; or (2) by *the receipt of written communications* purporting to be in his handwriting, in reply to documents addressed to him by or on behalf of the witness; though the evidence will be strengthened by the communications having been acted on as genuine between the parties; or (3) *by having observed, in the ordinary course of business*, documents purporting to be in the party's handwriting; a method which applies also to the proof of ancient handwriting (Fitzwalter Peerage, 10 C. & F. 193; Lindsay Peerage, 2 H. L. C. 557; *ante*, p. 49).

The witness's knowledge must not, however, have been acquired for the express purpose of qualifying him to testify at the trial (Best s. 236; R. *v.* Crouch, 4 Cox 163; Stanger *v.* Searle, 1 Esp. 15; and judgments of Patteson and Coleridge, JJ., in Doe *v.* Suckermore, 5 A. & E. 703; Fitzwalter Peerage, *supra*). And if his opinion rest upon extrinsic circumstances—*e.g.* the probabilities of the case, or the character, or conduct of the supposed writer, and not on his actual knowledge of the handwriting—it will be rejected (Da Costa *v.* Pym, Peake, Ev. App. 85).

The witness need not swear to his belief, his bare opinion being admissible, though a mere statement that the writing is *like* that of the supposed writer is insufficient (Tay. s. 1868).

The evidence being primary, and not secondary, in its nature will not become inadmissible because the writer

himself, or some one who saw the document written, might have been called (Best s. 232; Tay. s. 1862; Wright *v.* Cobb, L. T. vol. lxxvi. 159); or because the disputed document cannot be produced, as where it is lost or incapable of removal (Sayer *v.* Glossop, 2 Ex. 409; Lucas *v.* Williams, 1892, 2 Q. B. 113).

Proof must of course be given of the *identity* of the writer where the witness is not personally acquainted with him.

Libel. Meaning of Words.[b]—The opinions of witnesses are admissible to prove the innuendoes of a libel (Starkie on Libel, 5th ed. 465; Odgers on Libel, 567; Whart. s. 975). And although such opinions are not receivable to explain ordinary words used in any ordinary sense; yet it is otherwise with ordinary words used in a peculiar sense, as where a slanderous meaning is imputed to apparently innocent language; but in such cases a foundation must always be laid by first asking the witness whether there was anything in the circumstances of the case, or in the conduct or tone of the speaker, to prevent the words from conveying their ordinary meaning; the question may then be put, "What did you understand by the words?" (Daines *v.* Hartley, 3 Ex. 200; Brunswick *v.* Harmer, 3 C. & K. 10; Barnett *v.* Allen, 3 H. & N. 376; Simmons *v.* Mitchell, 6 App. Cas. 156, 163; see Curtis *v.* Peek, cited *ante*, p. 257).

Mental and Physical Conditions.[c]—Except on the question of the witness's sanity (Bootle *v.* Blundle, 19 Ves. 506; Knight *v.* Young, 2 V. & B. 184; Pope on Lunacy, 394) he may, as we have seen, always testify as to his own mental or physical condition at a given time, his testimony being based not on inference but consciousness (*ante*, p. 28); so he may, when the question is material, be asked what he thinks induced him to do a particular act (Mansell *v.* Clements, L. R. 9 C. P. 139).

It is not so with respect to the mental condition of *others;* thus, neither the opinion of non-experts (Wright *v.* Tatham, 7 A. & E. 313; R. *v.* Neville, Cr. & Dix. Ab. Cas. 96); nor general reputation (Greenslade *v.* Dare, 20 Beav. 284) is admissible in this country to prove insanity, the proper course being for the witness to state the facts which he considers give rise to that conclusion. Witnesses may, however, describe the apparent condition of people and

things—*e.g.*, that a person appeared to be drunk or sober, old or young, pleased or agitated; that a building or document was in good or bad preservation; or that two persons seemed to be attached to each other,—for here the phenomena are often too numerous and intangible to permit of being satisfactorily described otherwise than by the impression produced (Best s. 517; Tay. s. 1416; Powell 110).

Character.—In practice, as we have seen, the opinions of witnesses are receivable on this subject (*ante*, p. 82).

Other Cases.—As all language embodies inferences of some sort, it is not possible to wholly dissociate statement of opinion from statement of fact. The evidentiary test has been said to be, that if the fact stated *necessarily* involves the component facts, it will be admissible as amounting to a mere abbreviation; if it does not necessarily involve them, but may be supported upon several distinct phases of fact, the particulars only should be given and not the inference. Thus, though a witness might, without objection, state that "A. shot B.," or "A. stabbed B.," yet the statement that "A. killed B." would be improper, as involving a conclusion that might be remote and doubtful, and apply equally to a variety of different incidents [*ante*, p. 24; Whart. ss. 15, 509–513. And see a reply to Dr. Wharton on this point by Mr. Justice Stephen, 3 Southern Law Rep (Amer.) 567; Chamberlayne's Best s. 511].

EXAMPLES.

Admissible.

(*a*) To prove A.'s handwriting, the opinion of B., who has seen him write but once, and then only his surname (Lewis *v.* Sapio, M. & M. 39); of C., who only saw him write twenty years ago (R. *v.* Tooke, 25 How. St. Tr. 71); and of D., A.'s servant, who has never seen him write, but has habitually posted his letters (Doe *v.* Suckermore, 5 A. & E. 703, *per* Lord Denman), are admissible. —So, to prove the writing of A., a merchant living abroad;—the opinion of B., a merchant in London who has written to, and received answers purporting to come

Inadmissible.

(*a*) To prove the handwriting of A. (a prisoner), the opinion of a constable, who in order to obtain a knowledge of his writing had paid him some money, and got him to write a receipt, is inadmissible (R. *v.* Crouch, 4 Cox 163).

To prove a defendant's handwriting, the opinion of the plaintiff's attorney, who had frequently seen and acted on papers in the master's office, which the defendant's attorney admitted had been written by the defendant, is inadmissible. [Greaves *v.* Hunter, 2 C. & P. 477. In Smith *v.* Sainsbury, 5 C. & P. 196,

Admissible.	*Inadmissible.*
from A. (Carey *v.* Pitt, Peake Add. Cas. 130); of C., B.'s clerk, who has constantly read such letters; and of D., B.'s broker, who has habitually seen and been consulted about them (Doe *v.* Suckermore, *supra*, *per* Lord Denman), are admissible, although neither B., C., nor D., ever saw A. write.	where one party had filed an affidavit made by A., the attorney to the opposite party was allowed to prove A.'s signature to another document from merely having seen the signature to the affidavit. This appears, however, to have been a case of estoppel, Tay. s. 1865.]
To prove the handwriting of A. (a deceased curate), to a marriage certificate eighty-five years old, the opinion of B., the parish clerk, who only knew A.'s writing from various old signatures of A., in the parish register, is admissible (Doe *v.* Davies, 10 Q. B. 314).—So the opinion of C., the solicitor to A.'s family, who only knew A.'s writing by having examined, in the course of business, documents purporting to be in A.'s writing (Fitzwalter Peerage, 10 C. & F. 193).	To prove the handwriting of an ancient document, the opinion of a witness, although an expert, who had acquired his knowledge not from a course of business, but from having *studied* other genuine signatures (*not produced*) for the express purpose of testifying, is inadmissible (Fitzwalter Peerage, *supra*).
(*b*) To prove that a libel referred to the plaintiff, though it did not mention him by name, the opinions of his friends that, upon reading the libel, they understood it to refer to him, are admissible (Odjers 567); so their opinions that a caricature, which had been destroyed before the trial, represented him, are receivable (Du Bost *v.* Beresford, 2 Camp. 512).	(*b*) A. sues B. for libel in having written that A. should "return to his natural and sinister obscurity." The opinions of witnesses are not admissible to explain these words, there being nothing to show that they were not used in their ordinary sense (Brunswick *v.* Harmer, 3 C. & K. 10; in Barnett *v.* Allen, 3 H. & N. 376, the Court was divided as to whether the word "blackleg" could be so explained).
A. is indicted for writing to B. threatening that if B. sold his farm to certain persons he would "suffer as before"; B. may, after explaining the circumstances, state that he understood by the expression that A. intended to burn his house down (R. *v.* Hendy, 4 Cox 243).	
(*c*) In an action by a house-agent to recover commission on the sale of a house, the evidence of the purchaser that "he thought he should not have bought the house, had it not	(*c*) The question being as to the sanity of a testator, the opinions of non-medical friends called as witnesses (R. *v.* Neville, Cr. & Dix Ab. Cas. 96), or the opinions of deceased friends

Admissible.	*Inadmissible.*
been for the agent's card to view," is receivable (Mansell *v.* Clements, L. R. 9 C. P. 139).	expressed by their letters and conduct; and the fact that he was publicly elected to a responsible office, are inadmissible (Wright *v.* Tatham, 7 A. &. E. 313, *ante*, p. 52). [For further examples of cases in which the opinions or inferences of ordinary witnesses have been rejected see Bonfield *v.* Smith, Law *v.* Capron, Rigg *v.* Manchester Ry. Co., cited *ante*, pp. 29, 30].

CHAPTER XXXVII.

JUDGMENTS.

General Rules.

THE following general rules apply to judgments of every description :—

(1) **All Judgments are Conclusive of their Existence as Distinguished from their Truth.**—Every judgment is conclusive evidence for or against all persons, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. In other words the law attributes unerring verity to the *substantive* as opposed to the *judicial* portions of the record (Best, s. 590; Tay. s. 1667; Steph. art. 40).

Principle.—The reason is, that a judgment being a public transaction of a solemn nature must be presumed to be faithfully recorded (Tay. s. 1667).

Thus, where A. has been tried and acquitted of a crime against B., and afterwards sues B. for malicious prosecution, the record in the criminal trial is conclusive evidence of A.'s acquittal; but it is, as we shall presently see, no proof whatever that A. was innocent, or that B. was the prosecutor or was actuated by malice (Legatt *v.* Tollervey, 14 East 302; Purcell *v.* Macnamara, 9 East 361). So a verdict against a master in an action for the negligence of his servant is conclusive proof, in an action by the master against the servant, of the amount of the damages recovered against the master; but it is not even admissible to prove the servant's negligence (Green *v.* New River Co., 4 T. R. 590). And similarly, a judgment by a creditor against a surety is evidence in an action by the surety against the principal debtor, of the amount the surety has

been compelled to pay, but not of his liability to pay it (King *v.* Norman, 4 C. B. 884; and see *Ex parte* Young, *Re* Kitchen, 17 Ch. D. 668, *post*, p. 285).

So, judgments are admissible in this connection when they are tendered for the purpose of introducing the former testimony of a witness, or as constituting a link of title, or an act of ownership (Brew *v.* Haren, I. R. 11 C. L. 198); or as explaining the character in which the parties sue, defend, or hold property (Davies *v.* Lowndes, 6 M. & Gr. 520; Lyell *v.* Kennedy, 14 App. Cas. 437).

(2) **All Judgments are Conclusive of their Truth in Favour of the Judge.**—The judgment of a Court of competent jurisdiction is conclusive for the purpose of protecting the judge who pronounced, and the officers who enforced it, when acting within the scope of their authority.

In other words, the original proceedings and judgment thereon constitute conclusive proof of the facts stated if, assuming such facts to be true, they show that the judge had jurisdiction (Tay. ss. 1669–1672; and see 84–86; Steph. art. 45; Ros. N.P. 204–205, 1194–1201). In the case of orders made either under special statutory authority or by justices, however, the facts necessary to give the jurisdiction must appear on the face of the proceedings either expressly or by necessary implication (Taylor *v.* Clemson, 11 C. & F. 610; Christie *v.* Unwin, 11 A. & E. 373; R. *v.* Kent, 16 Cox 583; though such recitals are no evidence of the existence of the facts for other purposes, R. *v.* Gilkes, 2 M. & R. 454).

The rule only protects where the judge has acted without jurisdiction under a *bonâ fide* mistake of fact; and not where he knew, or had the means of knowing, his error (Calder *v.* Halket, 3 Moo. P. C. 28); or has acted under a mistake of law (Houlden *v.* Smith, 14 Q. B. 841).

Principle.—The rule is founded on public policy for the protection of judges and their subordinates, since without it no one would be so rash as to undertake such offices (Tay. s. 1699).

Thus, where a justice had ordered the seizure of a boat under the provision of the Bumboat Act (2 Geo. III. c. 28), the owner was precluded in an action against the justice from proving that it was a vessel and not a boat (Brittain *v.* Kinnaird, 1 B. & B. 432; and see Kemp *v.*

Neville, 10 C. B. N. S. 523; and Ros N. P. 1149 *et seq.*) So, with an order under a Highway Act, for the removal of timber encumbering the highway, the owner was estopped in an action against the justice from proving that the place was no part of the highway (Mould *v.* Williams, 5 Q. B. 469.) On the other hand, a county court judge was not protected where he committed a party residing out of his jurisdiction for contempt in disobeying an order of the Court (Houlden *v.* Smith, *supra.*)

(3) **All Judgments are Impeachable on certain Grounds.** —Every judgment may be impeached on the ground that it was (1) *not final, e.g.*, that it was interlocutory, or reversed (the pendency of an appeal is not sufficient); or was a mere nonsuit; discontinuance (under O. 26 r. 1; or by agreement, The Kronprintz, 12 App. Cas. 256); or withdrawal (of the record, under O. 22, rr. 1 & 2; of a juror, Thomas *v.* Exeter Post, 18 Q. B. D. 823; or by discharge of the jury by consent, Carnegie *v.* Carnegie, 15 L. R. I, 430); or (2) *not on the merits, e.g.*, that it was obtained on some technical objection, or default of pleading (*In re* Orrell, 12 Ch. D. 681), or misconception of the form of action, or because the debt was not then due, or the plaintiff was under a temporary disability to sue (Tay, s. 1719). But a judgment by consent is binding (Serrao *v.* Noel, 15 Q. B. D. 550; The Bellcairn, 10 P. D. 165; provided it proceed upon a compromise of the cause of action and not upon some merely technical default, Magnus *v.* National Bank of Scotland, 57 L. J. Ch. 902); as also is a compromise sanctioned by the Court. Further, every judgment may be impeached for (3) *want of jurisdiction* (or in the case of orders by justices, or under special statutory powers, omission to recite facts showing jurisdiction); or (4) *fraud, collusion, or forgery.* Proof of fraud, however, can only be given by a stranger to the judgment who is in no way privy to the fraud, and not by a party, since, if the latter were innocent, he might have applied to vacate the judgment, and if guilty he cannot escape the consequence of his own wrong (Tay. s. 1713; Steph. art. 46). So, as to collusion—*e.g.*, where the parties, even without fraud, were not really in contest (Earl of Bandon *v.* Becker, 2 C. & F. 510; Girdlestone *v.* Brighton Aquarium Co., 4 Ex. D. 107).

A foreign judgment (which term includes judgments, whether strictly of record or not, emanating from Irish, Scotch, Colonial, and foreign tribunals), may, in addition to the above, be impeached on the grounds of being (5) contrary to the law of nations; (6) repugnant to the natural justice—*e.g.*, where a party had no notice of the proceedings, or acted as judge in his own cause; (7) manifestly opposed to the law of the country in which it was pronounced (Meyer *v.* Ralli, 1 C. P. D. 358, *sed quære*, and see 2 Smith, L. C. 880–881); mistake of English law will not vitiate the judgment, Godard *v.* Gray, L. R. 6 Q. B. 139; *Re* Trufort, 36 Ch. D. 600; (8) so grossly defective as to render it doubtful what point, if any, was actually decided; or (9) manifestly erroneous as professing to be made upon grounds which do not warrant the decision. [Tay. s. 1729; Ros. N. P. 205–207; and see fully Piggott on Foreign Judgments, 100–178; Everest & Strode on Estoppel, 123–156].

Judgments as Evidence of their Truth between Parties, Privies and Strangers.

The admissibility and effect of judgments when tendered between parties, privies, or strangers as evidence of the matters decided, or of the grounds of the decision, vary according as the judgments are *in rem* or *in personam*.

But no judgment of either kind is evidence of the truth of any matter not *directly decided, or a necessary ground of the decision;* thus, it is never evidence of facts which merely came collaterally in question, or were incidentally cognisable, or can only be inferred by argument from the decision (R. *v.* Duchess of Kingston, 20 How. St. Tr. 538, 2 Smith L. C. 9th ed. 812; R. *v.* Hutchings, 6 Q. B. D. 300; Concha *v.* Concha, 11 App. Cas. 541); nor, *à fortiori*, does any estoppel arise as to the mere reasons assigned for a judgment (Allsop *v.* Joy, 61 L. T. 213).

It should also be noticed, as a point common to both species of adjudications, that judgments may have a different effect according as they are *for or against* a party; thus, a conviction for non-repair of a road is conclusive against a

parish of its liability to repair, but an acquittal (which does not, like a conviction, ascertain any precise fact) is not evidence for it of non-liability (R. *v.* St. Pancras, 1 Peake 220; R. *v.* Wick St. Lawrence, 5 B. & Ad. 526; Cooke *v.* Sholl, 5 T. R. 256). So, a decree of divorce, altering status, concludes even strangers; but a judgment dismissing the petition affects only parties and privies (Needham *v.* Bremner, L. R. 1 C. P. 583). See also for a distinction between judgments for or against joint-debtors (*post*, pp. 284, 285).

A judgment *in rem* has been defined as "an adjudication upon the status of some particular subject-matter by a tribunal having competent authority for that purpose" (2 Smith L. C. 9th ed. 838; Piggott on Foreign Judgments, 244); a definition which though seemingly the best that can be framed upon a difficult subject is imperfect in that it fails to distinguish between territorial and extra-territorial status (Whart. ss. 815–818); besides including in its terms matters which are not properly classed as judgments *in rem*—*e.g.*, criminal convictions and inquisitions (Tay. s. 164).

The following is a list of the principal adjudications of this nature:—(1) Judgments of condemnation of property as forfeited, whether pronounced by the old Court of Exchequer (now the Q. B. D.), or perhaps by the Commissioners or sub-Commissioners of Excise, Inland Revenue, or Customs; (2) adjudications in the Admiralty Court on the subject of prize, or for the enforcement of maritime lien; (3) decrees of the Divorce Court, provided they alter status—*e.g.*, decrees of judicial separation, or for dissolution or nullity of marriage, but not a judgment of adultery not followed by a decree (Needham *v.* Bremner, L. R. 1 C. P. 583); nor a decree in a suit for jactitation of marriage (Duchess of Kingston's Case, 20 How. St. Tr. 538); (4) grants of probate and administration; (5) adjudications in bankruptcy (Bpy. Act, 1883, s. 132, sub-s. 2); (6) sentences of deprivation and expulsion, whether delivered by a spiritual court, visitor, or college); (7) old judgments of outlawry, and declarations of legitimacy under 21 & 22 Vict. c. 53; (8) orders of removal in settlement cases, if either unappealed against or confirmed; (9) judges' certificates of the due election of a member of parliament under

31 & 32 Vict. c. 125 (Waygood *v.* James, L. R. 4 C. P. 361), but not their reports under the same Act (Stevens *v.* Tillett, L. R. 6 C. P. 147); (10) judgments for the Crown on *scire facias* for the repeal of patents (Ros. N. P. 193; the procedure is now by petition under the Patents Act 1883, s. 26); (11) adjudications by Commissioners of Inland Revenue upon stamp duties (Tay. s. 1763), and various other judgments or orders made under special statutory powers; as well perhaps as (12) sentences of Courts-martial Tay. s. 1675).

Judgments *in personam* are the ordinary judgments between parties in cases of contract, tort, or crime. It has been suggested that the term *inter partes* would be a more correct designation to distinguish them from those adjudications *in rem* which affect personal status (2 Smith L. C. 837); but as most judgments *in rem* are also *inter partes*, the advantage of the suggestion is not apparent. The former classification has been recognised by the legislature (24 & 25 Vict. c. 10, s. 35).

JUDGMENTS IN REM.—A domestic judgment *in rem* is in civil proceedings (and perhaps in criminal also, 2 Sm. L. C. 859–860; Tay. ss. 1680–1681) conclusive evidence for or against all persons, whether parties privies or strangers, of the *matters actually decided;* and this probably, although it has not been pleaded (Tay. s. 1673). It is also, as between parties and privies, conclusive of the *grounds of the decision* where these have been put in issue and actually decided by the Court; but as between strangers, or a party and a stranger, it is no evidence of such grounds except upon questions of *prize*, where it is conclusive if the ground of condemnation is plainly stated and admissible if not [Tay. ss. 1733–1734; orders of removal of paupers have been considered to form a second exception, R. *v.* Hartington, 4 E. & B. 780; R. *v.* Wye, 7 A. & E. 770 (though the former case was doubted in R. *v.* Hutchings, 6 Q. B. D. 300); and Exchequer condemnations a third, Hardy *v.* Macnamara, 4 Price 154 *n.*; Geyer *v.* Aguilar, 7 T. R. 681. See for a discussion of these alleged exceptions, De Mora *v.* Concha, 29 Ch. D. 268].

A foreign judgment *in rem* is generally conclusive against strangers only upon questions of *prize*, where the ground

of condemnation is plainly stated; or of *marriage and divorce*, where the marriage was solemnised and the parties domiciled in the foreign country; or of *bankruptcy*, as to contracts made in such country; or of *probate, administration, and guardianship* to a limited extent.

[See Tay. ss. 1732–1738; Piggott on Foreign Judgments; Foote on Private International Law, 572–583; Everest & Strode on Estoppel, 157–192; Whart, ss. 813–818].

Principle.—The principle of the conclusiveness of judgments *in rem* as regards *persons* is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt; and as regards *things*, that generally speaking every one who can be effected by the decision may protect his interests by becoming a party to the proceedings. In addition to which it is to be remembered that a decision *in rem* not merely declares the status of the person or thing, but *ipso facto* renders it such as it is declared; thus, a decree of divorce not only annuls the marriage but renders the wife *feme sole;* an adjudication in bankruptcy not only declares, but constitutes, the debtor a bankrupt; a sentence in a prize Court not merely declares the vessel prize, but vests in it the captor.

[Tay. ss. 1674–1681, 1733–1738; Best, s. 593; Ros. N. P. 193–4; 2 Smith, L. C. 9th ed. 837–840; Everest and Strode on Estoppel, 75–116; Whart. ss. 814–818.]

Conflicting Judgments in Rem.—Where there have been conflicting judgments *in rem*, the effect it seems is to set the whole matter at large again (see R. *v.* Wye, 7 A. & E. 770; R. *v.* Hutchings, 6 Q. B. D. 300).

EXAMPLES.

Admissible.	*Inadmissible.*
A. obtains probate of B.'s will (which he has forged) and sues C. for a debt due to B.;—the probate is conclusive evidence, until revoked, that A. is B.'s executor (Allen *v.* Dundas, 3 T. R. 125; *post*, Probate, p. 300).	A. obtains probate of B.'s will;—in an action between C. and D. the probate is neither conclusive nor, perhaps, admissible to show the genuineness of the will (see R. *v.* Buttery, R. & R. 342; R. *v.* Gibson, *id.* 343 *n.*); the sanity of the testator (Marriot *v.* Marriot, 1 Str. 671), his domicil (Concha *v.* Concha, 11 App. Cas. 541), or his death (Tay. s. 1677; *post*, Probate).

Admissible.	*Inadmissible.*
In an action between a ship-owner and an underwriter, the question being whether the cargo was neutral or enemy's property, the sentence of a foreign prize Court condemning the ship and cargo on the ground that the cargo was enemy's property, is conclusive, though neither plaintiff nor defendant were parties to the foreign proceedings (Geyer *v.* Aguilar, 7 T. R. 681).	A. is prosecuted for bigamy in marrying B. during the lifetime of C.;—a decree in a suit for jactitation of marriage made on the ground that C. was not A.'s husband, is not admissible to disprove the former marriage (Duchess of Kingston's Case, 20 How. St. Tr. 538).

JUDGMENTS IN PERSONAM AS AFFECTING PARTIES AND PRIVIES.—The judgment of a court of competent jurisdiction is conclusive proof, in subsequent proceedings between the same parties or their privies, of the matter actually decided (R. *v.* Duchess of Kingston, 20 How. St. Tr. 538), as well as of the grounds of the decision where these can be clearly discovered from the judgment itself (Alison's case, L. R. 9 Ch. 1, 25; Priestman *v.* Thomas, 9 P. D. 210).

This rule applies in general equally to civil and criminal proceedings, and to County Courts, as well as to courts of summary jurisdiction (Wright *v.* Lond. Gen. Omnibus Co., 2 Q. B. D. 271, R. *v.* Miles, 24 Q. B. D. 423); but an order of a court of summary jurisdiction will not operate as an estoppel (1) as to any matter which that Court had no authority to adjudicate directly and immediately between the parties; nor (2) as to any matter incidentally coming in question as to which a finding if held conclusive between the parties would operate in prejudice of the rights of others not parties to the proceedings; nor (3) as to any incidental matter not otherwise determined than as having been the particular ground on which the Court dismissed a charge or complaint (R. *v.* Hutchings, 6 Q. B. D. 300, 304); and under certain statutes no estoppel arises—*e.g.*, a dismissal on the merits of a bastardy summons under 7 & 8 Vict. c. 101, s. 2, though evidence upon, is no bar to, a subsequent summons under the same statute (R. *v.* Gaunt, L. R. 2 Q. B. 466; R. *v.* Hall, 57 L. T. 306; Saunders on Affiliation, 53–59); nor is a magistrate's order as to the delivery up of goods under £15 any bar under 2 & 3 Vict.

c. 71, s. 40, to a subsequent action for trover (Dover *v.* Child, 1 Ex. D. 172); see also as to county court orders for possession of premises under 51 & 52 Vict. c. 43, s. 138, Ros. N.P. 203.

In bankruptcy the consideration for a judgment may, on account of the danger of fraud, always be inquired into, at the instance either of the trustee or of the debtor himself (*Ex parte* Lennox, 16 Q. B. D. 315; *Ex parte* Flateau, 22 Q. B. D. 83; *post*, p. 296); and the file proceedings creates no estoppel (*Ex parte* Bacon, 17 Ch. D. 447). So a balance order under the Companies Act, 1862, does not estop (Westmorland Co. *v.* Feilden (1891) 3 Ch. 15).

A foreign judgment *in personam* is in like manner (and subject to the various grounds of impeachment mentioned *ante*, p. 276) conclusive between parties and privies. But such judgments do not, like domestic judgments, operate as a merger of the original cause of action; and the plaintiff may therefore sue either upon the judgment or the original cause of action. In the latter case the judgment is considered as evidence merely, but not conclusive, of the subsequent claim (Tay. s. 1786; see Piggott on Foreign Judgments, 22–32; Foote, Private International Law, 543–572).

Effect as Plea, Evidence, or Stay.—The old rule, established by the Duchess of Kingston's case, *supra*, was, that judgments upon the same matter and between the same parties were "as a plea and a bar, and as evidence conclusive;" but later decisions have qualified the latter part of this rule, and judgments are now only conclusive as evidence where there has been no opportunity of pleading them, since if a party elect not to plead an estoppel where he may, he is deemed to waive it, and to leave the prior judgment as evidence only for the jury, who may find the contrary (Ros. N. P. 189; Steph. art. 54; see Conradi *v.* Conradi, L. R. 1 P. & M. 514, for an instance of this result).

Where a plea of *res judicata* would obviously succeed, the party may also, without pleading, apply at once to have the action stayed, under the inherent jurisdiction of the Court, apart from O. 25, r. 4 (Blair *v.* Cordner, 36 W. R. 64; Richel *v.* McGrath, 14 App. Cas. 665; McDougall *v.* Knight, 25 Q. B. D. 1). And the same course may be adopted if the second action has been commenced *before* the delivery of

judgment in the first (Caird *v.* Moss, 33 Ch. D. 22; The Delta, 1 P. D. 393, 404; Houston *v.* Sligo, 29 Ch. D. 448. As to staying a concurrent action brought in a foreign country, see Law Journal, June 18, 1892, p. 395).

Principle.—The grounds upon which parties and privies are precluded from re-litigating the same matter between them are, first, that of public policy, it being in the interest of the State that there should be an end of litigation, *interest rei publicæ ut sit finis litium;* second, that of hardship to the individual, that he should be twice vexed for the same cause, *nemo bis vexari pro eâdem causâ, nemo bis puniri pro uno delicto* (Lockyer *v.* Ferryman, 2 App. Cas. 519, *per* Lord Blackburn).

[Tay. ss. 1684–1710; Best, ss. 588–595; Ros. N. P. 189–192; Powell, 240–249; Steph. art. 41; 2 S. L. C. 9th ed. 829–904; Everest & Strode on Estoppel, 51–74; Broom's Legal Maxims, 316–333; Whart. ss. 758–794].

(1) **Same Parties or their Privies. Mutuality.**[a]—The term *parties* includes not only those named in the record, but those who have obtained liberty to attend the proceedings (Askew *v.* Woodward, 21 W. R. 573); and probably (in conformity with the rule as to admissions) all persons who are substantially interested in the result (Tay. ss. 1687–1688; see Nominal and Real Parties, *ante*, p. 129). Thus, an infant suing by a next friend or defending by a guardian is considered a party, although the latter is not (Sinclair *v.* Sinclair, 13 M. & W. 640, *ante*, p. 130); and he is bound even if the action was brought without his knowledge or consent (Morgan *v.* Thorne, 7 M. & W. 400); though it is otherwise in this respect with a person *sui juris* (Bayley *v.* Buckland, 1 Ex. 1).

A party to be affected must, however, sue or defend in the *same right and character;* thus, a judgment against a man claiming *ex parte paternâ* will not bind him claiming *ex parte maternâ* (Stark, Ev. 337); nor would a judgment against him personally be evidence against him in a representative capacity or *vice versâ* (Ros N. P. 189; Powell, 242; unless it seems he be sued personally for a wrong done as such representative, Spencer *v.* Thompson, 6 Ir. L. R. N. S. 537, 566; Jewsbury *v.* Mummery, L. R. 8 C. P. 56); and the same rule applies where he sustains two different characters (*e.g.*, executor and administrator, Robin-

son's Case, 5 Rep. 32); or represents two different interests (Leggott *v.* Great Northern Railway, 1 Q. B. D. 599).

A fortiori, a judgment in a criminal trial is not admissible against the same person in a civil action, nor *vice versa*, since the parties are necessarily different (Castrique *v.* Imrie, L. R. 4 E. & I. 434, *per* Lord Blackburn).

Privies.—Judgments are also conclusive for or against privies (see *ante*, p. 131). Thus, as instances of successive relationship, judgments for or against an ancestor are evidence for or against his heir; those against a testator bind his executor, legatee, or devisee; and the same rule applies to grantees, mortgagees, and assignees, provided their titles accrue subsequently to the judgment (Doe *v.* Derby, 1 A. & E. 790; Tay. s. 1689). So, a judgment against the holder of an office will bind his successor (Richel *v.* McGrath, 14 App. Cas. 665); and one against a representative class, a future member of that class (Commissioners of Sewers *v.* Gellatly, 3 Ch. D. 610; Llanover *v.* Homfray, 19 Ch. D. 224). And, if successive remainders are limited by the same deed, a judgment for one remainderman is evidence for the next in succession (Doe *v.* Tyler, 6 Bing. 390; Doe *v.* Harlow, 12 A. & E 42 (*d*).)—But a judgment against a tenant for life or years does not bind a reversioner, for the latter claims independently (Rees *v.* Watts, 3 M. & W. 527; Wenman *v.* McKenzie, 5 E. & B. 447, Tay. s. 1693); nor does a decree against a predecessor in title, restraining an injury to land, bind successors (A.-G. *v.* Birmingham, &c., 17 Ch. D. 685).

The privy is also bound where the relationship is mutual and not successive. Thus, as instances of *joint liability* in contract: a judgment against a partner or joint contractor is (unless obtained after the dissolution of the partnership by death, *In re* Hodgson, Beckett *v.* Ramsdale, 31 Ch. D. 177; Partnership Act 1890, s. 9) a bar to separate actions, or a joint action, against the rest, although the former judgment remains unsatisfied (Tay. s. 1691; King *v.* Hoare, 13 M. & W 494; Kendall *v.* Hamilton, 4 App. Cas. 504; Cambefort *v.* Chapman, 19 Q. B. D. 229, where an unsatisfied judgment against one partner on his bill for a partnership debt was held to bar an action against another on the original cause of action; but this case is doubted in Lindley on Partnership, p. lix.); or was rescinded

with the judgment debtor's consent (Hammond *v.* Schofield, 1891, 1 Q. B. 453); or one of the debtors was a married woman contracting in respect of her separate estate (Hoare *v.* Niblett, 1891, 1 Q. B. 781), the reason being not only that the cause of action is merged in the judgment, but that the right of each debtor to be sued jointly with the rest is gone (Kendall *v.* Hamilton, *supra*; Pilley *v.* Robinson, 20 Q. B. D. 155). A judgment in favour of one of several joint debtors, however, must, in order to exempt the others, have proceeded on a ground that would operate as a discharge to all (Phillips *v.* Ward, 33 L. J. Ex. 7).

Where the liability in contract is *joint and several* no estoppel will arise. Thus, a separate judgment, while unsatisfied, against one debtor will not bar separate actions against the rest (Lechmere *v.* Fletcher, 1 C. & M. 623; King *v.* Hoare, *supra*; Drake *v.* Mitchell, 3 East 251, explained in Cambefort *v.* Chapman, *supra*; Vestry of Bermondsey *v.* Ramsey, L. R. 6 C. P. 247; *Re* Davidson, 13 Q. B. D. 50; Blyth *v.* Fladgate, 1891, 1 Ch. 337, 353; the dictum of Mr. Taylor to the contrary, s. 1691, cannot be maintained); nor a joint judgment against all separate actions against each (*Re* Davidson *supra*; the opposite is stated in Lindley, p. 256). A joint and several liability in tort is generally extinguished by a judgment recovered against any one of the parties liable (Brinsmead *v.* Harrison, L. R. 7 C. P. 547; Buckland *v.* Johnson, 15 C. B. 145; see Munster *v.* Cox, 1 Times L. R. 542); but this principle has been held not to apply to a joint and several liability arising from a breach of trust, a joint judgment against all forming no bar to separate proceedings against each (*Re* Davidson, *supra*; Pollock Partnership Act, 1890, p. 41); nor a separate judgment against one any bar to actions against the rest (Blyth *v.* Fladgate, *supra*).

Judgments against executors or administrators do not necessarily bind residuary legatees, or next of kin, since the former do not represent the estate for all purposes (Concha *v.* Concha, 11 App. Cas. 541; Harvey *v.* Wilde, L. R. 14 Eq. 438; and see Spencer *v.* Williams, L. R. 2 P. & D. 230); nor in the absence of agreement will a judgment against a principal bind his surety (Parker *v.* Lewis, 8 Ch. App. 1035; *Ex parte* Young, *In re* Kitchen, 17 Ch. D. 668); nor a judgment against a wife's separate estate for

an ante-nuptial debt, bar a subsequent action against her husband (Beck *v.* Pierce, 23 Q. B. D. 316).

The rule requiring identity of parties is often expressed in another form by the maxim *estoppels must be mutual;* it being a well-established principle that no one can take advantage of a judgment unless he would also have been concluded had it gone against him (Wenman *v.* McKenzie, 5 E. & B. 447; Spencer *v.* Williams, *supra*; De Mora *v.* Concha, 29 Ch. D. 268; Stark, Ev. 331).

(2) **Same Subject-matter and Object.**[b]—In order that a former judgment should conclude the parties thereto or their privies, either as an estoppel or as evidence, the matter in dispute must be the same in both proceedings; though it is not necessary that it should be the only point determined in either (Tay. ss. 1695–1701; 1705–1710; Stark, Ev. 333–337; Ros N.P. 192.

The question of the identity of the issues, which is often one of great nicety, must be determined by the judge, or if the facts are in dispute by the jury, upon the evidence adduced (Tay. s. 1695); and in order to decide it the pleadings in the former action (Robinson *v.* Duleep Sing, 11 Ch. D. 798); the report of the judge who tried the case (Houston *v.* Sligo, 29 Ch. D. 448); or oral evidence (*e.g.*, the testimony of an arbitrator to explain, though not to contradict, his award: Buccleuch *v.* Metropolitan Board of Works, L. R. 5 H. L. 418) may be resorted to. On the one hand, the issues may be the same, although the form of action and the marshalling of the parties may be different; on the other, the issues may be distinct, though both relate to the same transaction or property. The safest test is to inquire whether the *same evidence would support both issues.*

Same Object.—It is now settled that when once a given fact has been put in issue and decided between the parties, it will conclude them and their privies from re-litigating such fact in any subsequent proceeding although brought for a different purpose or object (Flitters *v.* Allfrey, L. R. 10 C. P. 29; Finney *v.* Finney, L. R. 1 P. & D. 483; Priestman *v.* Thomas, 9 P. D. 70, 210). An important distinction must, however, be borne in mind on this subject, for although the foregoing is true with regard to *findings of fact*, yet to raise an estoppel on the *right determined* the two suits must be for the same purpose and object (Barrs

v. Jackson, 1 Y. & C. Ch. 585; Hunter *v.* Stewart, 31 L. J. Ch. 346; Nelson *v.* Couch, 15 C. B. N. S. 99; Rio Tinto Co. *v.* Société des Metaux, 6 Times L. R. 408; Whittaker *v.* Kershaw, 45 Ch. D. 320, 327. This distinction, which helps to reconcile many of the conflicting dicta on the subject, was taken *arguendo* in De Mora *v.* Concha, 29 Ch. D. 268, 292).

It is perhaps hardly necessary to remark that though the parties are generally precluded from re-litigating the same point, a case may sometimes, by leave of the Court, be re-opened upon the discovery of fresh evidence tending in a different direction (see Stevens *v.* Tillett, L. R. 6 C. P. 146, 170; *In re* May, 28 Ch. D. 516; Phosphate Sewage Co. *v.* Molleson, 4 App. Cas. 801). So, whether the issues are the same or not, the parties may be estopped, not on the ground of *res judicata*, but of *election* (see *Re* Davidson, 13 Q. B. D. 50; *Ex parte* Collins *re* Cook, 66 L. T. 29).

(3) **Whole Case.**[c]—The parties are also, in general, estopped as to their whole case, and will not be permitted to re-open the same subject-matter of litigation merely because they have from negligence, inadvertence, or even accident, omitted a part of their case (Henderson *v.* Henderson, 3 Hare 115). Thus, they may not split their cause of action (Russell *v.* Waterford Railway Co., 16 L. R. I. 314; McDougall *v.* Knight, 25 Q. B. D. 1; and see County Court Act, 1888, s. 81); or their relief (Serrao *v.* Noel, 15 Q. B. D. 549; Wright *v.* General Omnibus Co., 2 Q. B. D. 271); or set up facts which were available for them under any of the issues tried in the former action (Jewsbury *v.* Mummery, L. R. 8 C. P. 56; Bagot *v.* Williams, 3 B. & C. 239; Dunn *v.* Murray, 9 B. & C. 780). And if all matters in difference are referred, this is an estoppel as to every claim falling within the scope of the reference (Smith *v.* Johnson, 15 East 213; Dunn *v.* Murray, *supra*; Henderson *v.* Henderson, *supra*); though not as to others outside it (Ravee *v.* Farmer, 4 T. R. 146; see Rhodes *v.* Airedale Commissioners, 1 C. P. D. 402).

But plaintiffs are not bound, nor estopped if they fail, to join *distinct* causes of action though arising in respect of the same transaction (Brunsden *v.* Humphrey, 14 Q. B. D. 141); or distinct equities entitling to the same relief (Hunter *v.* Stewart, 31 L. J. Ch. 346; and see as to this

case, Piggott, Foreign Judgments, pp. 48–51). Nor are defendants obliged to litigate all, or any, of their defences in a particular suit (Howlett *v.* Tarte, 10 C. B. N. S. 813; Davies *v.* Hedges, L. R. 6 Q. B. 687; Houston *v.* Sligo, 29 Ch. D. 448; Caird *v.* Moss, 33 Ch. D. 22); *à fortiori*, no estoppel arises if the parties had no opportunity of obtaining in the former suit the relief sought in the latter (Nelson *v.* Couch, 15 C. B. N. S. 99; The Orient, L. R. 3 P. C. 696; The Sylph, L. R. 2 Ad. 24); or if the question raised in the second action was not, and could not properly have been, decided in the former suit (Bainbrigge *v.* Baddeley, 2 Phil. 705; Toulmin *v.* Copland, *Ibid.* 711; Blake *v.* O'Kelly, 9 Ir. R. Eq. 54; Houston *v.* Sligo, *supra*; Worman *v.* Worman, 43 Ch. D. 296); or if, though in fact raised and decided, it was unnecessary to the decision (Concha *v.* Concha, 11 App. Cas. 541). In *criminal cases* a similar rule prevails; an acquittal or conviction being conclusive upon a second indictment, either for the same offence, or for any other of which the prisoner might have been convicted under the first. So, where the first offence was the subject of summary proceedings, and the defendant is accused a second time, upon summons or indictment, for the same offence, whether charged in the original or in a more aggravated form [Tay. ss. 1705–1710; 1 Russ. Cr. 38 *et seq.*; Ros. Cr. Ev. 187–189; Warburton Lead. Cas. in Cr. Law, 228–231; R. *v.* Miles, 24 Q. B. D. 423; Ryley *v.* Brown, 17 Cox 79].

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) A., as public officer of a bank, having obtained judgment against B. for a debt due to the bank, arrests him for a greater amount than is adjudged due. In a subsequent action for malicious arrest by B. against A. personally, A. is estopped from disputing the correct amount of the debt, though in the former action he sued in *autre droit* (Spencer *v.* Thompson, 6 Ir. L. R. N. S. 537).	(*a*) A. is convicted of forging B.'s signature to a bill of exchange. B. is afterwards sued by C., to whom A has transferred the bill. A.'s conviction is not admissible to prove the forgery (*per* Blackburn J., in Castrique *v.* Imri, L. R. 4 E. & I. 434. For a converse case see R. *v.* Fontaine Moreau, 11 Q. B. 1028).
Certain tenants of a manor, on behalf of themselves and all	A., as administratrix of B. (her deceased husband), obtains judgment against a railway company, under Lord Campbell's Act, for damages for B.'s death from a

Admissible.

other tenants, sue the lord in respect of a manorial right. The judgment in this suit is conclusive in an action for the same cause between a subsequent lord and other tenants, the two sets of parties being privy in estate (Llanover *v.* Homfrey, 19 Ch. D. 224).

A judgment in a suit between A., the incumbent of a living, and C., the patron, deciding that the living was vacant on the grounds of A.'s resignation, is conclusive in an action by B., the succeeding incumbent, against A., in which the question was whether A.'s resignation was valid (Reichel *v.* McGrath, 14 App. Cas. 665).

Inadmissible.

collision. She is not estopped from afterwards, as administratrix, suing the company for injury to B.'s personal estate by the same accident, since in the former action she represented B.'s widow and children personally, and in the latter B.'s estate merely (Leggott *v.* G. N. R., 1 Q. B. D. 599).

A judgment in a probate suit between the executor and next of kin of a testator, in which the domicil of the latter was declared to be English, does not estop the next of kin from bringing a subsequent action against the residuary legatee, in which the question was whether the domicil was not Chilian, and as such did not deprive the testator of the power to bequeath more than a quarter of his property to strangers, the executor not representing the parties in such a dispute, and the question of domicil being also unnecessary to the former decision (Concha *v.* Concha, 11 App. Cas. 541); so a judgment against an executor does not bind a devisee (Harvey *v.* Wilde, L. R. 14 Eq. 438).

A. sues B. for necessaries supplied to B.'s wife whilst living apart from him. B.'s defence is that his wife was living in adultery at the time. A verdict in former divorce proceedings finding that B.'s wife had committed adultery, but followed by a judgment dismissing B.'s petition on the ground of his own adultery, is not admissible against A. to prove the wife's adultery (Needham *v.* Bremner, L. R. 1. C. P. 583; *contra* Day *v.* Spread, Jebb & B. 163, where a similar judgment was considered as *primâ facie*, though not conclusive evidence, on the ground

Admissible.	*Inadmissible.*
	that A. might be considered as claiming through the wife ; see also Keegan *v.* Smith, 5 B. & C. 377).
	A., the incoming tenant of a public-house, applies for, but fails to obtain, a new licence. This is no bar to B., a subsequent tenant, obtaining either a new licence, or a transfer of the old one from A.'s predecessor (R. *v.* Upper Osgoldcross, 53 J. P. 23 ; see R. *v.* Thomas, 1892, 1 Q. B. 426).
(*b*) A. recovers judgment against B. for a debt, B. having pleaded but failed to prove payment. This judgment is conclusive proof that the debt was owing, in a subsequent action brought by B. against A. to recover the money, on the ground that he had since found A.'s receipt for its payment (Marriott *v.* Hampton, 2 Smith, L. C. 9th ed. 441).	(*b*) A. sues B. for damages for false imprisonment and obtains judgment. A. is not barred from afterwards suing B. for damages for malicious prosecution, the cause of action being different, though the jury in the former trial were misdirected to consider B.'s malicious conduct (Guest *v.* Warren, 9 Ex. R. 379).
A. being sued by a company for unpaid premium and calls, obtains judgment on the ground that he was never legally a shareholder. This judgment is conclusive in A.'s favour in a subsequent action by him against the company to recover monies paid by him as a shareholder (Alison's case, L. R. 9 Ch. App. 24).	The owner of vessel A. recovers judgment against the owner of vessel B. for damages for a collision caused by the negligence of B.'s captain. The owner of B. is not estopped by this judgment from recovering damages from the owner of A. for the same collision as being caused by the negligence of A.'s captain (The Calypso, 1 Swa. Ad. 28).—So, where, in the first action, vessel B. was in tow of vessel C. at the time of the collision, and at the trial the owners of C. were let in to defend ;—a judgment by A. against B. does not estop B. from bringing a subsequent action against C., the issue being different (Shankland *v.* Baine, 1881, cited Pritch. Adm. Dig. 660).
In a claim by A. and B. to administration of the goods of C., deceased, a grant is made to A. on the ground that, "as far as appears by the evidence," A. is next of kin to C. This judgment is conclusive proof that A. is nearer of kin than B., in a suit between them for the distribution of the effects of C. (Barrs *v.* Jackson, 1 Phil. 582 ; Spencer *v.* Williams, L. R. 2 P. & D. 230 ; Hankin *v.* Turner, 10 Ch. D. 372 ; and see Concha *v.* Concha, 11 App. Cas. 541).	

Admissible.

A. sues B. in the County Court for damages for wrongful dismissal. A judgment against A. in this action bars a subsequent claim before justices against B. to recover his wages; the question in the two proceedings being the same—*i.e.*, whether the discharge was wrongful (Routledge *v.* Hislop, 29 L. J. M. C. 90).

A. sues B. in the County Court to recover possession of certain hereditaments. B. applies to a judge in chambers for a prohibition on the ground that their annual value exceeds £20. The dismissal of this summons estops B. from proving in the action that the premises are of greater value than £20 (Symonds *v.* Rees, 1 Ex. D. 41).

A. excavates into B.'s mine, causing damage by an inflow of water.—A recovery by B. bars an action by him for future inflows through the same excavation, the cause of action being entire and not continuous (Clegg *v.* Dearden, 12 Q. B. 576).

A. recovers judgment against B. for damages for misrepresentation as to the drainage of a farm;—A. is estopped from bringing an action for future damage resulting from the same misrepresentation, the cause of action not being continuous (Clarke *v.* York, 31 W. R. 62).

Inadmissible.

A. sues B. in the County Court for damages for wrongful dismissal. B., without making any set-off or counter-claim, gives evidence, in justification of the dismissal, of B.'s negligence in damaging his property.—A judgment against B. in this action does not estop B. from seeking damages for A.'s negligence before justices, the negligence justifying compensation not being necessarily sufficient to justify dismissal (Hindley *v.* Haslam, 3 Q. B. D. 481).

A. excavating in his own mine, causes damage to B.'s house by a subsidence. A recovery by B. is no bar to an action for a future subsidence from the same excavation, the cause of action being continuous, whether the damage itself is continuous or not (Mitchell *v.* Darley, M. C. Co. 11 App. Cas. 127; Crumbie *v.* Wallsend Local Board, 1891, 1 Q. B. 503.—Here the cause of action is not the excavation, which was perfectly lawful, but the damage from the subsidence due to his act).

A. erects an obstruction on B.'s land.—A recovery by A. is no bar to a future action in respect of the same obstruction, the cause of action being its continued non-removal (Holmes *v.* Wilson, 10 A. & E. 503; Thompson *v.* Gibson, 7 M. & W. 456; and see Clegg *v.* Dearden, *supra*, in which these cases are distinguished. As to successive judgments against a servant for absenting himself from work,

Admissible.	*Inadmissible.*
	see Cutler *v.* Turner, L. R. 9 Q. B. 502; and as to continued false imprisonment, Hardy *v.* Ryle, 9 B. & C. 608).
A mortgagor covenants to pay the principal sum secured by the mortgage and, by a separate covenant, to pay interest at seven per cent. "so long as the principal sum, or any part thereof, remains unpaid;"—a judgment recovered by the mortgagee for principal and interest precludes him from bringing a second action for interest at the higher rate accrued since the judgment (*In re* Sneyd, 25 Ch. D. 338; *In re* European C R. Co., 4 Ch. D. 33).	A mortgagor covenants to pay the principal sum secured by the mortgage, and by a separate covenant, to pay interest at seven per cent. "so long as any sum remains due either on the covenants or any judgment in respect thereof." A judgment recovered by the mortgagee for principal and interest does not bar a subsequent action for interest at the higher rate accrued since the judgment [*In re* Sneyd, *supra*, *per* Fry, L. J.; and see Popple *v.* Sylvester, 22 Ch. D. 98; and Florence *v.* Jennings, 2 C. B. N. S. 454, explained by Cotton, L. J. in the first of the above cases].
In a probate suit between A. and B., a will, propounded by A. is, under a compromise, admitted to probate; afterwards B. obtains judgment against A. in a chancery action setting aside the compromise on the ground that the will was forged. This judgment is conclusive evidence of the forgery in a further probate suit by B. against A. to revoke the probate, although the *objects* of the two suits are different, and the relief sought in the former could not have been obtained in the latter action (Priestman *v.* Thomas, 9 P. D. 210).	In an administration suit to which A. and B. are parties, A. is found entitled to certain property by purchase; this is no bar to subsequent proceedings by B. against A. to set aside the purchase on the ground of fraud (Widgery *v.* Tepper, 7 Ch. D. 423).
	In a collision cause in the Admiralty Court, A. obtains a judgment *in rem* against B.'s ship;—A. is not estopped from afterwards suing B. *in personam* if the proceeds of the sale are insufficient to pay his claim (Nelson *v.* Couch, 15 C. B. N. S. 99).—So an action to enforce the sale of mortgaged property does not bar subsequent proceedings against the debtor for the unpaid balance (*id.*); nor does an executor's action against a legatee for the sale of shares prematurely transferred to the latter, bar a subsequent action against him to refund the balance of the legacy (Whittaker *v.* Kershaw,

Admissible.	*Inadmissible.*
(*c*) A., in a running-down case, recovers damages against B. for injury done to his carriage. A. is estopped from afterwards recovering damages for injury done to his horse by the same accident (see Brunsden *v.* Humphreys, 14 Q. B. D. 141.—So if the two injuries had been to different parts of his person, *ibid.*).	45 Ch. D. 320, 327; see, however, Wright *v.* London G. O. Co., *infra*). (*c*) A., in a running-down case, recovers damages against B. for injury done to his carriage: A. is not estopped from afterwards recovering damages for injury done to his person by the same accident, injury to property and injury to person giving rise to distinct causes of action which he is not bound to join (Brunsden *v.* Humphreys, *supra*).
A. sues a railway company for damage done to certain sacks of flour whilst in transit, he having at the time notice from B., to whom he had sold other sacks, part of the same consignment, that such other sacks had also been injured;—A. is precluded from bringing a second action against the company for the damage done to B.'s flour, there being but one cause of action, and A. having an opportunity of claiming for B.'s damage in the first action (Russell *v.* Waterford Ry. Co., 16 L. R. Ir. 314).	A recovers judgment against B. for obstructing a watercourse, B.'s defence being a denial of the obstruction. In a second action for a subsequent obstruction, B. is not precluded from denying A.'s right to the watercourse (Evelyn *v.* Haynes, explained in Outram *v.* Morewood, 3 East 365); so if B. is sued for rent, and lets judment go by default, he is not estopped in a second action for subsequent rent from raising a set-off which he omitted from the first (Howlett *v.* Tarte, 10 C. B. N. S. 813).
A. sues B. for libellous statements contained in a pamphlet; judgment is given for B.;—A. is estopped from bringing a subsequent action against B. for other libellous statements contained in the same pamphlet (McDougall *v.* Knight, 25 Q. B. D. 1).	A. sues B. for the price of a kitchen-range and obtains judgment. B. is not estopped from afterwards suing A. for negligence in the construction of the range (Rigge *v.* Burbidge, 15 M. & W. 598; Davis *v.* Hedges, L. R. 6 Q. B. 687).
A. sues B. for three items of an account, and consents to judgment for two. He is estopped from afterwards bringing an action for the third (Bagot *v.* Williams, 3 B. & C. 235; Dunn *v.* Murray, 9 B. & C. 780).	A. sues B. in the County Court, B. pleading a cross claim exceeding the amount recoverable in a County Court;—B. is not estopped from recovering the balance of his claim against A. in a second action (Webster *v.* Armstrong, 54 L. J. Q. B. 236; *aliter* if the plaintiff abandons part of an entire claim in order to sue in the County Court, see County Court Act, 1888, s. 81; Vines *v.* Arnold, 8 C. B. 632).
A. summonses B. before a magistrate for furious driving, and is awarded compensation;—he is estopped from afterwards suing B. for further compensation (Wright *v.* London Gene-	

Admissible.	*Inadmissible.*
ral Omnibus Co., 2 Q. B. D. 271; but see *supra*, Nelson *v.* Couch, and Whittaker *v* Kershaw).	A. sues B. for rescission of a contract, judgment being given for B. A. is not estopped from afterwards suing B. for damages for its breach (Callandar *v.* Dittrich, 4 M. & G. 68).
A. sues B. in the Chancery Division for the delivery up of certain shares, and obtains judgment by consent;—A. is estopped from afterwards suing B. in the Queen's Bench Division for damages for the detention of the shares, as the cause of action is the same, and the latter relief might, and ought to, have been sought in the former action (Serrao *v.* Noel, 15 Q. B. D. 549).	
A. obtains a judgment, finding assets against B., as executor;—in a subsequent action by A. for devastavit, B. is estopped from proving that he misapplied the assets with A.'s consent, as this is in effect a plea of no assets, which B. might have proved by the same facts in the former action (Jewsbury *v.* Mummery, L. R. 8 C. P. 56).	A., as B.'s executor, files a bill against C., as executor *de son tort*, for administration of B.'s estate, also raising issues in the bill as to the validity of a transfer of stock from B. to C., and as to B.'s sanity at the time;—An ordinary decree for administration is granted without mention of these issues. This decree does not preclude A. from raising the same issues in a subsequent suit against C., as they could not have been properly determined in, and were not relevant to, the relief sought by the former suit (Blake *v.* O'Kelly, 9 Ir. R. Eq. 54; see Bainbrigge *v.* Baddeley, 2 Phil. 705).
A. in a partnership suit against B. obtains a decree ordering a reference to a master to compute what is due to him upon all accounts in question in the pleadings, under which reference only a portion of the transactions of the partnership are gone into;—A. cannot afterwards sue B in respect of the others (Henderson *v.* Henderson, 3 Hare, 100).	A. files a bill in equity against a company, claiming to be admitted as a shareholder upon the ground that he is the transferee of certain shares;—he is not estopped from afterwards filing a bill against the same company claiming to be admitted as a shareholder on the ground that the course of dealing adopted by the company with respect to the issue of shares entitled him to membership (Hunter *v.* Stewart, 31 L. J. Ch. 336).
A. is indicted for the murder of B. and acquitted. He cannot	A. is indicted for wounding, with intent to kill B.; an ac-

Admissible.	*Inadmissible.*
afterwards be indicted for the manslaughter of B.; nor *vice versâ* (2 Hale, 246; Holcroft's Case, 4 Rep. 46 b.; R. *v.* Toovey, 13 Cox 217).	quittal or conviction on this charge is no bar to a subsequent indictment on the same facts for the murder of B. (R. *v.* de Salvi, cited R. *v.* Morris, L. R. 1. C. C. 90).
A. is convicted before justices of a common assault upon B.;—he cannot afterwards be indicted upon the same facts for wounding with intent to murder B. (R. *v.* Stanton, 5 Cox 324; R. *v.* Ebrington, 1 B. & S. 688).	A. is convicted before justices of a common assault upon B.;—this conviction is no bar to a subsequent indictment upon the same facts for B.'s murder, manslaughter, or rape (see R. *v.* Miles, 24 Q. B. D. 423, *per* Hawkins, J.; R. *v.* Morris, *supra*).

JUDGMENTS IN PERSONAM AS AFFECTING STRANGERS.—A judgment *in personam* is no evidence of the truth either of the decision or of its grounds, between strangers or a party and a stranger, except (1) upon questions of public and general interest; (2) in bankruptcy, administration, and divorce to a limited extent; (3) when so operating by contract or admission.

Principle.—*Against Strangers.* Though the above rule is well settled, the reasons of the rule are by no means so clear. Such judgments, when tendered against strangers, are sometimes said to be excluded as opinion evidence (R. *v.* Moreau, 11 Q. B. 1028); sometimes as hearsay (Steph. art. 14; Whart. s. 820; though it has been objected to this view that even if the judge were called as a witness he would not be competent either to pronounce or to prove his judgment, "An English Evidence Code," Sol. Jour. Sept. 5, 1877); but more commonly on the ground expressed in the maxim *res inter alios acta* (*or judicata*) *alteri nocere non debet*, it being considered unjust that a man should be affected, and still more that he should be bound, by proceedings in which he could not make defence, cross-examine, or appeal. This, however, though a legitimate ground for refusing conclusiveness to such judgments, seems hardly a satisfactory reason for denying them admissibility, since it is to be remembered that the objection of *res inter alios acta* will not suffice to exclude other and less solemn acts of strangers if relevant to the issue (*ante*, Similar Facts). It is sometimes said that if a man is not to be bound by the

acts of strangers, neither should they be given in evidence against him (Stark. Ev. 83–85; Broom's Legal Maxims, 909); but there is of course no connection between the two; and in the majority of cases even a man's own acts are not conclusive, though they may always be given in evidence against him (see a criticism of the above maxim by Mr. C. H. Barrows, 1 Am. L. Rev. 350).—*For strangers against parties.* Judgments in *personam* are said not to be evidence for a stranger even against a party, because their operation would thus not be *mutual.* This also, however, would seem to be rather an objection to conclusiveness than to admissibility.

[Tay. ss. 1682–1683, 1694; Best, s. 590; Ros. N. P. 190–192; Steph. art. 44; Whart. ss. 820–823.]

(1) **Public Rights.**[a]—Judgments and verdicts upon public or general rights are not only conclusive between parties and privies, but are *primâ facie* evidence of the matter decided between strangers or a party and a stranger. They are not, however, conclusive in such cases, for the general reasons stated *supra* (Stark. Ev. 387–388; Tay. s. 1684; in Petrie *v.* Nuttall, 11 Ex. 569, *infra*, p. 298, the Court however remarked that such a judgment was "possibly conclusive," and this is adopted by Steph. art. 44, illustr. f.; *sed qu.*).

They are sometimes regarded as a species of judgment *in rem*, but are more usually considered as in the nature of, though stronger than, *reputation* (Stark. 386; Tay. s. 624). They are not receivable, however, in other cases in which reputation is evidence—*e.g.*, pedigree (*ante*, p. 201).

Neither interlocutory judgments, awards, nor claims not prosecuted to verdict or judgment are, as we have seen, admissible under this head (*ante*, p. 188).

[Stark. Ev. 386–388; Tay. ss. 624–626; 1682–1684; Ros. N. P. 190–192; Steph. art. 44; Whart. ss. 200, 794; and see *ante*, pp. 187–188.]

(2) **Bankruptcy, Administration, Divorce.**[b]—In bankruptcy, administration, and winding-up proceedings judgments are received as *primâ facie* proof of debt even against strangers.

To guard against fraud, collusion, and the miscarriage of justice, however, the Court will, where there are circumstances of suspicion, inquire into the consideration

for, and if necessary reject, the judgment, either at the instance of the trustee, or of the debtor himself (*Ex parte* Lennox, 16 Q. B. D. 315; *Ex parte* Flatau, 22 Q. B. D. 83). And when the only evidence of debt was a judgment obtained *since* the bankruptcy, the proof was rejected (*Ex parte* Bonham, 14 Q. B. D. 605).

For bankruptcy cases in which the parties have or have not been precluded on the ground of election from bringing subsequent actions, see *In re* Bremner, 10 Ch. App. 379; *Ex parte* Collins, *Re* Crook, 66 L. T. 29; *In re* Davidson, 13 Q. B. D. 50.

In *Divorce* proceedings, the Queen's Proctor or co-respondent may take advantage of (Conradi *v.* Conradi, L. R. 1 P. & D. 514), though he is not necessarily bound by (Harding *v.* Harding, 34 L. J. Mat. 129), a previous judgment between the petitioner and respondent. The reasons for this exception to the principle of mutuality are peculiar to the Divorce Division.

(3) **Contract and Admission.**[c]—A stranger to a judgment may also be bound by it if he has expressly so contracted. Thus, if A. contract to indemnify B. against any damages recoverable against the latter by C., and B. has *bonâ fide* defended the action and paid the amount, the judgment will be conclusive of A.'s liability. But this does not apply where B. has no contract with, but merely a claim against, A. for such indemnity (Parker *v.* Lewis, 8 Ch. App. 1035; *Ex parte* Young, *Re* Kitchen, 17 Ch. D. 608).

A record is also sometimes received in favour of a stranger against one of the parties, as containing a solemn *admission* by such party in a judicial proceeding, with respect to a certain fact. This is no real exception, however, to the rule requiring mutuality, since the record is not received as a judgment conclusively establishing the fact, but merely as the deliberate declaration of the party that the fact was so. It belongs therefore to the subject of admissions rather than to that of judgments.

[1 Greenleaf, s. 527 *a*; Tay. s. 1694; Steph. art. 44; Whart, ss. 758, 836–837.]

EXAMPLES.

Admissible.

(*a*) A. sues B. for trespassing upon his land, B.'s defence being that the land was part of a highway;—a previous conviction against A. for nuisance in obstructing the highway at the spot in question is *primâ facie* evidence that such spot was part of the highway (Petrie *v.* Nuttall, 11 Ex. 569).

(*b*) A. recovers a judgment for debt against B., who afterwards becomes bankrupt;—the judgment is *primâ facie* evidence of the debt against B.'s trustee and other creditors. (*Ex parte* Anderson, *In re* Tollemache 14 Q. B. D. 606).

A., a creditor, recovers judgment for his debt against B.'s executors;—in a suit for the administration of B.'s estate, this judgment is *primâ facie* evidence of A.'s debt against C. & D., the persons interested in the realty, though they are not privies in estate to B. (Harvey *v.* Wilde, L. R. 14 Eq. 438. In this case the executors were also trustees for the real estate, but that fact was held to make no difference).

A. petitions for divorce by reason of his wife's adultery with B., the petition being dismissed on the ground of A.'s own adultery;—this dismissal is conclusive to prove A.'s adultery in a second petition against his wife for adultery with C., in which suit (neither the wife nor C. appearing) the Queen's Proctor had intervened (Conradi *v.* Conradi, L. R. 1 P. & D. 540).

(*c*) A. pleads guilty to a crime and is convicted; the record of judgment upon this plea is ad-

Inadmissible.

(*a*) In an action by a master against his servant for negligently injuring C.'s horse, a judgment recovered by C. against the master for such injury is not admissible to prove the servant's negligence [Green *v.* New River Co., 4 T. R. 590. *Aliter* to show the amount recovered by C. For other examples see *ante*, p. 274].

(*b*) On the trial of A. as accessory to a felony committed by B., the conviction of B., though admissible to prove that fact, is no evidence of B.'s guilt. [See R. *v.* Turner 1 Moo. C. C. 347; 1 Lewin 121; Steph. art. 40, illustr. *d.*] In R. *v.* Blick, 4 C. & P. 377, however, the conviction of the thief was held evidence of his guilt against the receiver; and in R. *v.* M'Cae, Jebb C. C. 120, on the trial of the receiver, the record of the acquittal of the thief was by eleven judges held admissible to contradict the latter's testimony that he had committed the crime. No reasons are given. See Tay. s. 1693, 1 Russ. Cr. 183, 184, Ros. Cr. Ex. (11th ed.) 50, 863.]

A. obtains a decree *nisi* for a divorce against his wife, who had pleaded, but failed to prove, A.'s own adultery. This decree does not debar the Queen's Proctor from proving A.'s adultery on an intervention in which the Queen's Proctor alleges the same charges against A., supported by fresh evidence (Harding *v.* Harding, 34 L. J. Mat. 124; Gladstone *v.* Gladstone, L. R. 3 P. & D. 260).

(*c*) A. pleads not guilty to a crime, but is convicted;—the record of judgment upon this plea

Admissible.	*Inadmissible.*
missible against him in a civil action, as a solemn judicial confession of the fact (R. *v.* Fontaine Moreau, 11 Q. B. 1033).	is not receivable against A. in a civil action as an admission to prove his guilt (R. *v.* Warden of the Fleet, 12 Mod. 339 ; see other cases, 1 Greenleaf, s. 527, *a*).
A. sues B. (a carrier) for goods delivered to the latter. A judgment recovered by B. against C., to whom B. had entrusted, but who had lost, them, is admissible against B., as amounting to an admission by him that he had received the goods (Tilley *v.* Cowling, 1 Ld. Raymond, 744. For a case in which a party having obtained the benefit of a judgment upon one construction of a deed was estopped from deriving a benefit from an opposite construction in an action against a third party, see Gandy *v.* Gandy, 30 Ch. D. 57).	

CHAPTER XXXVIII.

PROBATES, VERDICTS, AWARDS, DEPOSITIONS IN FORMER TRIALS, ETC.

PROBATES AND LETTERS OF ADMINISTRATION.—Probate of a will of **Personalty**, whether in solemn or common form, is an adjudication *in rem*, and until revoked affords conclusive evidence against all persons of—(1) The appointment of the executor; (2) the validity of the will, and its execution according to the law of the testator's domicil (Wicker *v.* Hume, 7 H. L. C. 120; Concha *v.* Concha, 11 App. Cas. 541); as well as of (3) its contents, the original will not being even admissible for this purpose (Pinney *v.* Pinney, 8 B. & C. 135; Pinney *v.* Hunt, 6 Ch. D. 243); and this applies to every part of the will; thus the probate is conclusive proof of a legacy which might have been expunged on the ground of forgery (Williams on Executors, 382), or of a will or codicil being distinct instruments, though written on the same paper (Baillie *v.* Butterfield, 1 Cox Eq. 392).

A decree, establishing the will and pronounced in a contentious suit, binds the next of kin, though not cited or intervening, provided they were cognisant of the suit, and had an opportunity of intervening; though a decree founded on a compromise only binds the parties to the compromise (Wytcherley *v.* Andrews, L. R. 2 P. & D. 327; Norman *v.* Stairs, 6 P. D. 619).

In the same way letters of administration are, until recalled, conclusive even against strangers of the title of the administrator; and, against parties and privies, of the persons who are next of kin (Barrs *v.* Jackson, 1 Phil. 582; Spencer *v.* Williams, L. R. 2 P. & D. 230; Hankin *v.* Turner, 10 Ch. D. 372; see Concha *v.* Concha, 11 App. Cas. 541).

Furthermore, no evidence to impeach the probate or letters, even on the grounds of fraud or forgery, is in general admissible, except in proceedings taken in the Probate division for their revocation (Melhuish *v.* Milton, 3 Ch. D. 27; Priestman *v.* Thomas, 9 P. D. 210); though it has been said that even in other Courts the title of the executor or administrator may be defeated by showing want of jurisdiction—*e.g.*, that the supposed testator or intestate is *alive* (Allen *v.* Dundas, 3 T. R. 125; Tay. s. 1714; Williams on Executors, 1903; and see Concha *v.* Concha, *supra;* and a discussion of the validity of administration to the estate of a living person, in 1 Am. Law Rev. N. S. 337); or that the value required a higher stamp (Ros. N. P. 201, 265); or that the seal is forged (Williams on Executors, 1903; Ros. N. P. 202); or that the grant has been revoked (B. N. P. 247).

Probates and letters are not, as we have seen (*ante*, p. 280) conclusive, or even perhaps admissible, evidence of the following matters:—The death of the testator or intestate (Thompson *v.* Donaldson, 3 Esp. 63; Moons *v.* de Bernales, 1 Rus. 301, 306; French *v.* French, 1 Dick. 268; for this is said to be a matter of inference, and not of adjudication, the grant assuming the fact of death; *contra*, Reilly *v.* Fitzgerald, 6 Ir. Eq. R. 349; *Re* Jackson, 1892, P. 255); his domicil (Concha *v.* Concha, *supra;* in Evans *v.* Hacon, 18 Ch. D. 347, however, the C. A. considered letters of administration *primâ facie* evidence of domicil); or the genuineness of the will (R. *v.* Buttery, R. & R. 342; R. *v.* Gibson, *id.* 343 *n.*). So, probate of a will in execution of a power is no evidence of the proper exercise of the power (Tay. s. 1712, and cases cited); nor is it primary evidence of a declaration contained in the will as to pedigree (*ante*, p. 198); nor are letters of administration any evidence of the intestate's marriage or the reverse (Blackham's case, cited in Barrs *v.* Jackson, 1 Phil. 588, 589).

Probate of a will of **Realty** is, in like manner, while unrevoked, conclusive evidence of the validity and contents of the will, if it has been either proved *in solemn form, or established by a decree in contentious proceedings* (20 & 21 Vict. c. 27, s. 62); but it will not affect the heir, devisee, or other person interested in the realty, unless he has been cited or made a party to the proceedings, or derives title

through a person so cited or made party (*id.* s. 63). Probate in *common* form of the will is also *primâ facie* evidence of any "devise or other testamentary disposition of or affecting real estate" (but not of collateral matters—*e.g.*, the appointment of a testamentary guardian, Cope *v.* Mooney, 14 Ir. L. R. N. S. 250); *provided* ten days' notice has been given to the opposite party of the intention to adduce the evidence (which notice need not specify the purpose for which the probate is wanted, Cope *v.* Mooney, *supra*), and provided the opposite party has not, within four days after its receipt, given counter-notice that he disputes the validity of such devise, &c. (*id.* s. 65; see Barraclough *v.* Greenhough, L. R. 2 Q. B. 612; Tay. 1761). Where such notices have not been given, the case may be adjourned either for this purpose, or to allow proof of the will, *per testes* (Hilliard *v.* Eiffe, L. R. 7 H. L. 39, 49).

[Tay, ss. 1759–1761; Ros. N. P. 201–202; Powell, 347–352; Whart. ss. 810–812; Coote, Probate, 10th ed. 352–356; Williams on Executors, 369; 556–577; 1902–1903.]

VERDICTS.—Verdicts, like judgments, are conclusive proof of the facts found as between parties and privies; but they are not admissible between strangers, or a party and a stranger, except when operating *in rem*, or as evidence in the nature of *reputation* (*ante*, p. 187).

Where the object is merely to show a trial had the associate's or master's certificate of the findings (or formerly the *postea* indorsed on the record) is sufficient evidence; but when the verdict is relied on as an estoppel, and probably also when tendered as evidence of the facts found, the judgment must be proved, for it might be that the latter was arrested, or a new trial granted (Banner *v.* Banner, 34 L. J. Mat. 14; Needham *v.* Bremner, L. R. 1 C. P. 583; Robinson *v.* Duleep Singh, 11 Ch. D. 798).

Ancient verdicts, however, are sometimes admitted as evidence of reputation without proof of the judgments rendered thereon.

[Ros. N. P. 189, 194; Tay. s. 1570; Powell, 339; Whart. ss. 781, 831; Everest & Strode on Estoppel, 26–27.]

AWARDS.—Generally, awards are, until set aside, conclusive proof of the matters decided as between parties and

privies; but they are not admissible between strangers even as evidence of reputation (R. *v.* Cotton, 3 Camp. 444; Evans *v.* Rees, 10 A. & E. 151; Wenham *v.* Mackenzie, 5 E. & B. 447); though they are sometimes received, in conjunction with the submission, as acts of ownership (Brett *v.* Beales, 1 M. & M. 416; Brew *v.* Haren, Ir. R. 9 C. L. 29; affirmed I. R. 11 C. L. 198).

The award must be final and certain; within the scope of the authority conferred; and must not prescribe what is illegal or impossible (Tay. 1458). But it cannot be impeached on the ground of the misconduct of the arbitrator (*e.g.*, omission to give one of the parties an opportunity of being heard, Thorburn *v.* Barnes, L. R. 2 C. P. 384; at least if application might have been successfully made to set aside the award, Ros. N. P. 480); nor of mistake (Johnson *v.* Durant, 2 B. & Ad. 925; unless such mistake is admitted by the arbitrator, Dinn *v.* Blake, 44 L. J. C. P. 276).

An award under the Lands Clauses Consolidation Act, 1845, has the same effect as the verdict of a sheriff's jury under that Act—*i.e.*, it is conclusive of the amount of, but not of the right to, compensation (*Re* Newbold and Metr. Ry. Co 14 C. B. N. S. 405; Beckett *v.* Midland Ry. Co. L. R. 1 C. P. 241; R. *v.* Cambrian Ry. Co. L. R. 4 Q. B. 320; Rhodes *v.* Airedale Commissioners, 1 C. P. D. 240; *In re* East London Ry. Co. 24 Q. B. D. 507). So, with an award under the Public Health Act, 1875 (Pearsall *v.* Brierly, &c., Board, 9 App. Cas. 595); or under the Artisans Dwellings Act, 1875 (Wilkins *v.* Mayor of Birmingham, 25 Ch. D. 78). An award, under the Inclosure Acts, 1845, s. 105, and 1848, ss. 13, 14, is not conclusive of the title to the lands allotted, and if made on the application of persons not interested in the lands, is *ultra vires* (Jacomb *v.* Turner, 1892, 1 Q. B. 47; and see Ros. N. P. 151, 218, Tay. s. 1584).

Under the Arbitration Act, 1889, s. 15, sub-s. 2, the report or award of any official or special referee or arbitrator on any reference under an order of the Court or a judge in any cause or matter is, unless set aside, equivalent to the verdict of a jury; and under s. 12 it may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect (see Annual Practice, notes to the above Act).

[Tay. ss. 1583–1584, 1607, 1758; Ros. N. P. 218, 275–277, 478–480; Powell, 352–353; Russell on Arbitrations, 553–561.]

REPORTS.—The reports of judicial officers, other than those made under the Arbitration Act, 1889, *supra*, are in a few cases receivable as evidence of the matters contained. Thus, on a question of *res judicata*, the report of the judge is evidence between the parties of what was decided on the former trial (Houston *v.* Marquis of Sligo, 29 Ch. D. 448). The report of the Official Receiver as to a bankrupt's conduct and affairs is *primâ facie* evidence of the matters contained on an application for discharge (Bankruptcy Act, 1883, ss. 18 and 28, sub-ss. 2 and 4; *Re* Wallace, 15 Q. B. D. 213); so it is *primâ facie* evidence, without an affidavit in support, to show grounds for the summary administration of the estate (*Re* Horniblow, 53 L. T. 155). The report of the Committee of the Law Society as to the conduct of a solicitor has, under the Solicitors Act, 1888, s. 13, the same effect as that of a master of the Court (*Re* a Solicitor, Sol. Jour. Dec. 5, 1891). As to the admissibility between strangers of reports on public matters, see *ante*, p. 231.

INQUISITIONS.—Inquisitions made under public authority, and for a public purpose, are, as we have seen, often receivable in proof of the facts determined against strangers (*ante*, p. 231). Inquisitions for private purposes are only admissible between parties and privies, and to a very limited extent. Thus, an inquisition before a sheriff's jury, under the Lands Clauses Consolidation Act, 1845, s. 68, is conclusive of the amount of, but not of the right to, compensation (*supra*, Awards). An inquisition by a sheriff's jury, taken before the Interpleader Act, 1 & 2 Will. 4, c. 58, for the purpose of ascertaining to whom goods seized under a *fi. fa.* belonged, was held wholly inadmissible as not being an inquisition under the Queen's writ, but merely a proceeding by the sheriff on his own authority (Glossop *v.* Pole, 3 M. & S. 175; Latkow *v.* Eamer, 2 H. Bl. 437).

[*Ante*, p. 231; Tay. ss. 1582, 1585, 1716–1717, 1767; Ros. N. P. 110–111, 194–196.]

PLEADINGS AND WRITS.—Pleadings are admissible

to prove their own existence, the institution of the suit, and the facts in issue between the parties (Tay. s. 1753; Whart. ss. 838–839; see Neison *v.* Walters, 61 L. T. 872). But being regarded in other respects rather as the suggestions of counsel than as the declarations of the parties, they are not receivable as admissions, unless verified by oath, or signed, or otherwise adopted by those against whom they are tendered (*ante*, pp. 126, 143, 149).

Old Bills in Chancery are governed by the same rule (Ros. N. P. 197; Tay. s. 1753; see Malcolmson *v.* O'Dea, 10 H. L. C. 593; Lyell *v.* Kennedy, 14 App. Cas. 437); but old *answers*, being upon oath, and such *pleas* as were sworn to, are receivable as admissions against the deponents or their privies (*id.*; as to their reception in cases of pedigree, see *ante*, p. 200). Old *demurrers* in equity are not so receivable, being merely hypothetical statements which, assuming the facts to be as alleged, denied that the defendant was bound to answer (Tay. s. 1753).

A Writ of summons is evidence of the amount claimed, but not of a debt due (Brown *v.* Dean, 5 B. & Ad. 848). A writ of execution has been held *primâ facie* evidence of a judgment, without the latter's production, against parties, but not against strangers (Doe *v.* Murless, 6 M. & S. 110; White *v.* Morris, 11 C. B. 1015). See further, Tay. s. 1766; Ros. N. P. 194.

DEPOSITIONS IN FORMER TRIALS.—At common law, testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent (or in a later stage of the same) trial in proof of the facts stated, provided—(1) That the proceedings are between the *same parties* or their privies; (2) that the *same issues* are involved; (3) that the party against whom, or whose privy, the evidence is tendered had on the former occasion a *full opportunity of cross-examination;* and (4) that the witness is *incapable of being called* on the second trial.

Principle.—The admission of such evidence has been said to be based on the consideration that the parties and the issues being the same, and full opportunity of cross-examination having been allowed, the second trial is virtually a continuation of the first (Whart. s. 177). The conditions, it will be seen, are analogous to those relating

to judgments; and indeed whenever a decree in one case would be evidence of the facts decided when tendered in another, there the testimony of a witness in the former trial who was liable to cross-examination, but is incapable of being called, is receivable. So, as to mutuality, the evidence is not admissible for, unless it would also be admissible against, a party (Morgan *v.* Nichol, L. R. 2 C. P. 117; Whart. s. 177; Tay. s. 469). The admissibility of the testimony, however, seems to turn rather on the right to cross-examine than on the precise identity of the parties or the issues—only a substantial identity in these respects being required (Tay. s. 467).

Where any of the four conditions above-mentioned are absent, the evidence will be rejected either as *res inter alios acta*, or, it is sometimes considered, as *hearsay*, since, though the oath and right to cross-examine may be present, yet the benefit of the demeanour of the witness is lost on the second trial.

Depositions in former trials, though not fulfilling the above conditions, are frequently receivable as admissions, or to contradict the same witness on the second trial, or (after the deponent's death) to prove public rights or pedigree.

As to depositions taken under statutory authority in earlier stages of the *same* proceeding, see fully, *post*, chap. xli.

[Tay. ss. 464–478; 546–549; Ros. N. P. 198–200; Best, s. 496; Powell, 229, 236, 543; Steph. art. 32; Whart. ss. 177–180.]

(1) **Former Trial.**—The witness must have been duly sworn in some judicial proceeding to which the party against whom the evidence is tendered was legally bound to submit (Stark. Ev., 415–418; Tay. s. 485). Thus, depositions taken in a revived suit where a bill of revivor did not lie have been rejected; though it was otherwise where the matter was within the jurisdiction of the Court, but the bill was dismissed merely because the subject was not proper for a decree in equity (Stark. Ev. 16); or where the depositions were taken without objection in judge's chambers, where the practice was not to cross-examine (Lawrence *v.* Maule, 4 Drew. 472).

(2) **Same Parties or Privies.**—If the parties to be affected are the same in both proceedings, it is no objection that there

were also different parties joined with either (Wright *v.* Tatham, 1 A. & E. 3).

Privies, may also be affected by, and take advantage of, the former testimony in the same way as of a judgment in a former trial (Morgan *v.* Nicholl, L. R. 2 C. P. 117; *ante* pp. 284, 286). And the title of the privy must have accrued subsequently to the former trial (Doe *v.* Derby, 1 A. E. 790, *per* Littledale, J.).

(3) **Same Issues.**—If substantially the same question is in issue in the two proceedings, it is immaterial that they relate to different transactions or property (Doe *v.* Foster, 1 A. & E. 791, *n.* (b); Llanover *v.* Homfray, 19 Ch. D. 224); and the same rule holds in criminal cases; thus, a deposition on a charge of stabbing, assault and robbery, or causing grievous bodily harm is admissible on a trial for murder arising out of the same facts (R. *v.* Smith, R. & R. 339; R. *v.* Lee, 4 F. & F. 63; R. *v.* Beeston, 24 L. J. M. C. 5; R. *v.* Dilmore, 6 Cox 52; R. *v.* Williams, 12 Cox 101; and see *ante*, p. 286; and *post*, p. 335).

(4) **Cross-examination.**—There must have been full opportunity of cross-examination in the former proceedings; thus, if the party against whom the evidence is subsequently tendered had not due notice of the time or place of the former examination (Fitzgerald *v.* Fitzgerald, 3 S. & T. 397); or if the issues are so dissimilar that cross-examination as to one would only partially cover the other (R. *v.* Beeston, *supra;* Tay, s. 468), the evidence will be rejected. But it is not essential that the opposite party should have *exercised* his right, for the evidence will be admissible if he voluntarily abstained from, or waived the absence of an opportunity for, cross-examination (Lawrence *v.* Maule, 4 Drew. 472; McCombie *v.* Anton, 6 M. & G. 27; Tay. s. 466). And if the witness died or became insane before cross-examination in the former trial the evidence will be admissible (Williams *v.* Williams, 12 W. R. 663; R. *v.* Doolin, 1 Jebb, C. C. 123; compare *post*, pp. 329, 336, 355).

(5) **Incapable of being called.**—For the purposes of the rule a witness is regarded as incapable of being called when he is either (1) *dead* (the death must be proved, or evidence given of unsuccessful inquiries or lapse of time sufficient to raise that presumption, Tay. s. 472); (2) *insane* (R. *v.* Eriswell, 3 T. R. 720; so it seems if the insanity be only tem-

porary, R. *v.* Marshall, Car. & M. 147, but this is doubted by Mr. Taylor, s. 476; if the depositions were taken shortly before the second trial it is necessary to show the witness was sane when they were taken, R. *v.* Wall cited 2 Russ. Cr. 890). (3) *Seriously ill.*—The degree of illness is somewhat in doubt; if it is such that there is no probability of the witness ever being able to attend, the depositions are of course admissible (Tay. s. 477); so, probably, if it is such as to prevent his attendance within a reasonable time (see Beaufort *v.* Crawshay, L. R. 1 C. P. 699, deciding that the words "permanent sickness or infirmity," in 1 Will. 4, c. 22, were to be thus construed); but if the indisposition be merely temporary, the proper course is not to admit the evidence, but to postpone the trial (Harrison *v.* Blades, 3 Camp. 458; R. *v.* Savage, 5 C. & P. 143, in which the depositions of a woman about to be confined were rejected, see *post.* p. 338). (4) *Kept out of the way by the opposite side* (R. *v.* Scaife, 17 Q. B. 238; Egan *v.* Larkin, 1 Arm. M. & O. 403. Mr. Taylor remarks that this proposition rests partly on the authority of decisions in civil and criminal courts, partly on statutory analogy, but chiefly on the broad principle of justice which will not allow a party to take advantage of his own wrong, s. 478). (5) In civil proceedings (only) is either *out of the jurisdiction*, or, *cannot be found after diligent search.* A witness has been considered beyond the jurisdiction who was on board ship ready to sail, but prevented by contrary winds (Fonsick *v.* Agar, 1 Taunt. 161; Ward *v.* Wells, *id.* 461; Varicas *v.* French, 2 C. & K. 100; though see Carruthers *v.* Graham, C. & M. 5). Proof of diligent but unsuccessful search will probably admit the depositions (Tay. s. 473; Falconer *v.* Hanson, 1 Camp. 171; Wiedemann *v.* Walpole, Times, June 15, 1891, *per* Pollock, B., affirmed 7 Times L. R. 722). Neither of the above grounds will let in the deposition in criminal cases (R. *v.* Scaife, 17 Q. B. 242; R. *v.* Austen, 7 Cox 55; R. *v.* Hagan, 8 C. & P. 167).

(6) **Proof of the Former Testimony.**—The testimony, if oral, may be proved from memory or notes, by any one who can swear to its accuracy; but not, unless at least by consent, by the judge's notes (Conradi *v.* Conradi, L. R. 1 P. & D. 514; Tay. s. 546; Powell, 231–233). It would seem to be sufficient if the substance merely, and not the

precise words, of the examination and cross-examination is given (Tay. ss. 546–547).

(7) **Objections.**—The evidence is open to the same objections in the subsequent trial as if the witness had been personally present thereat (Tay. ss. 548–549); *e.g.*, as to leading questions (Small *v.* Nairne, 13 Q. B. 840); statements of the contents of unproduced documents (Steinkeller *v.* Newton, 9 C. & P. 319; Tufton *v.* Whitmore, 12 A. & E. 370); save that a party cannot repudiate an illegal question previously put by his own side (Hutchinson *v.* Bernard, 2 M. & Rob. 1). Mr. Justice Stephen states that the credit of the declarant may be impeached in the same way as that of a witness who had denied in cross-examination the imputations suggested (art. 135); but see a discussion of this subject *ante*, p. 165.

EXAMPLES.

Admissible.	*Inadmissible.*
In an action by A. against D., the depositions of a witness, since deceased, taken in a prior action involving the same question, and brought by A. B. and C. jointly against D., are admissible (Wright *v.* Tatham, 1 A. & E. 3). So, in an action by A. as heir-at-law of B. to recover certain land from C., the depositions of a witness since deceased taken in a prior action by A. as heir of B. against C. to recover different lands, are admissible (Doe *v.* Derby, 1 A. & E. 791, *n.*).	In an action by A. to recover land from C.'s son; the depositions of a witness, since deceased, taken in a former action brought by A.'s son as heir-at-law of A. (whom he supposed to be dead) against C. to recover the same land, are inadmissible as A. did not claim through B. though B. claimed through A.; and the evidence not being admissible against, could not be admissible for, A. (Morgan *v.* Nicholl, L. R. 2 C. P. 117.)
In a suit brought in 1870 by certain customary tenants on behalf of themselves and all other tenants of a manor against the lord, to establish a right to the minerals under their tenements; the depositions of old persons, since deceased, taken *de bene esse* under a commission in a suit brought in 1815 by certain former tenants on behalf of themselves and all other tenants of the manor, to establish the same right, are admissible although the plaintiffs in 1870 did not	

Admissible.	*Inadmissible.*
claim through any of the former plaintiffs and the former lord, though he joined in the commission did not in fact cross-examine the deponents (Llanover *v.* Homfrey, 19 Ch. D. 224.)	
A. is indicted for uttering a forged note; the depositions of witnesses, since unable to travel, taken before a magistrate upon a former charge against A. arising out of the same transaction, of obtaining money by false pretences, are admissible (R. *v.* Williams, 12 Cox 101.)	

BOOK II.

ADMISSIBILITY OF EVIDENCE.

PART II.—WITNESSES.

CHAPTER XXXIX.

ATTENDANCE OF WITNESSES.

PROCESS.—There are three methods by which the attendance of witnesses may ordinarily be enforced in judicial proceedings—*subpœna* (which may be either *ad testificandum*, or if the production of documents in the witnesses' possession or control is required, *duces tecum*) *recognizance* and *summons*.

Subpœna.—A writ of subpœna (which may be issued at any stage of the proceedings and without leave; although the Court will, if necsssary, prevent the privilege being abused, Raymond *v.* Tapson, 22 Ch. D. 430; Fenton *v.* Comberledge, 48 L. T. 776) is the process employed when the proceedings are in the *High Court* (O. 37, rr. 26–34, either in Court, or in Chambers on a note from the judge, O. 37, r. 28); or before an examiner (O. 37, r. 20); and an affidavit witness may be ordered to attend for cross-examination by this process as well as by notice under O. 38, r. 28 (Connell *v.* Baker, 29 Ch. D. 711). The same process prevails in the *Bankruptcy Court* (Bankruptcy Rules 1883, 53–63); which has also special power to summon persons likely to give information as to the debtor's property or affairs (Bankruptcy Act, 1883, s. 27; *Re* Franks, 1892, 1 Q. B. 646); and applies to hearings before a *Referee* or *Arbitrator* (Arbitration Act, 1889, ss. 8, 18); and to the trial of election

petitions (Tay. s. 1283); and it may also be adopted in *Criminal Cases* where the witnesses have not been bound over (*infra*, Recognizance).

Witnesses *present in Court* cannot, however, in criminal cases, decline to be sworn unless duly served with a subpœna (R. *v.* Sadler, 4 C. & P. 218); though it is otherwise in civil cases (Bowles *v.* Johnson, 1 W. Bl. 36; and see Stuart *v.* Balkis Co., 32 W. R. 676; *contra*, Blackburn *v.* Hargreaves, 2 Lew. C. C. 259, which, however, is doubted by Mr. Taylor, s. 1242, *note*).

A *subpœna duces tecum* must specify the particular documents required (Newland *v.* Steere, 13 W. R. 1014); a mere general direction to produce "*all* documents relating to questions in issue" not being enforceable, unless the witness admits their possession (Lee *v.* Angus, L. R. 2 Eq. 59; *Re* Emma Silver Mining Co., L. R. 10 Ch. 194); and the subpœna should not be oppressive (Steele *v.* Savory, 8 Times L. R. 94). Where possession is held for another, as solicitor for client, the witness must attend with the document and submit the question of production to the judge (R. *v.* Greenaway, 7 Q. B. 126); though this has been held not to apply to a steward having the title-deeds of the estate, for his possession is that of his employer (Falmouth *v.* Moss, 11 Price 455); nor to a secretary of a company whose directors have forbidden him to produce the company's books (Crowther *v.* Appleby, L. R. 9 C. P. 23; R. *v.* Stuart, 2 Times L. R. 144); nor to a clerk in a public office, with respect to official papers (Austin *v.* Evans, 2 M. & G. 430); nor under the Bankruptcy Act, 1883, s. 27, to the managing clerk of a creditor (*Re* Higgs, *ex parte* Leicester, 66 L. T. 296), in which cases the witness cannot be compelled to produce his principal's documents.

As to what documents are privileged from production, see *ante*, pp. 93–116.

Recognizance.—In indictable offences (and several others in which an appeal lies to the sessions from a conviction by one or more justices, Tay. ss. 1237–1238), the witnesses both for the *prosecution* (11 & 12 Vict. c. 42, s. 20) and the *defence* (30 & 31 Vict. c. 35, s. 3, except witnesses to character) may be, and generally are, bound over by the committing magistrate to give evidence at the trial. And a similar power is given to coroners to enforce the attendance of

Crown witnesses at trials for murder or manslaughter (9 Geo. 4, c. 64, s. 4).

If this process has not been adopted, the witness may be served with a subpœna issued from the Crown Office, or by the Clerk of Assize or Quarter Sessions, as the case may be.

Summons.—A summons, which may contain a clause for the production of documents, is the process in use where the attendance of witnesses is required before the *Chief Clerk* in the High Court (O. 55, rr. 16–17; App. L.); and a Chief Clerk's summons, and not a subpœna, is the proper process in *winding-up proceedings* under the Company's Act, 1862, s. 115 (*Re* Westmoreland Co. 40 W. R. 171), as to summoning witnesses under the Act of 1890, s. 8, see *Re* Great Kreuger Co., W. N. 1892, p. 119; and *Re* Trust and Investment Corporation, *id.* p. 138). The same process is also employed in *County Courts* (C. C. Act, 1888, s. 110; C. C. R. 1889, O. 18, r. 1); before *magistrates* (who if the summons will probably be disobeyed may in lieu thereof issue a warrant, 11 & 12 Vict. c. 42, s. 16; 11 & 12 Vict. c. 43, s. 7; though it seems justices have no power to summon a witness to complete an information or to produce a document, Oke's Mag. Form. 10; Greenwood's Police Guide, 167); *Coroners* (7 & 8 Vict. c. 92, s. 17; Tay. s. 1299); and *Revising Barristers* (6 & 7 Vict. c. 18, ss. 35, 50–51; 41 & 42 Vict. c. 26, s. 36).

Witnesses in Prison.—The attendance of a witness when *in custody on civil process* (or detained in a lunatic asylum, Fennell *v.* Tait, 1 C. M. & R. 584; or by his superior officer in the army or navy, Tay. s. 1275) may be enforced in civil or criminal trials (or arbitrations, Arbitration Act, 1889, s. 18), by a writ of *habeas corpus ad testificandum*, issued by a judge of the High Court in Chambers (44 Geo. 3, c. 102; R. S. C. 1883, App. J. Form 2; Tay. ss. 1272–1275); and when *in custody on a criminal charge*, by a warrant or order of a Secretary of State or judge of the High Court (16 & 17 Vict. c. 30, s. 9; or of a County Court, where the proceedings are in the latter, C. C. Act, 1888, s. 112).

Witnesses out of Jurisdiction.—The attendance of witnesses resident in parts of the United Kingdom beyond the jurisdiction of the Court issuing the process is regulated as follows:—*Civil Actions.*—By 17 & 18 Vict. c. 34, ss. 1, 2, amended by the Judicature Act, 1884, s. 16, a writ of subpœna

may at any time be issued by special leave of a judge of the High Court to compel the attendance at trials therein (or before a referee or arbitrator, Arbitration Act, 1889, s. 18) of witnesses resident in Scotland and Ireland. So, County Court summonses to witnesses, to be served either in the home or any foreign district, may be issued without leave (C. C. R. 1889, O. 18, r. 1). *Criminal Cases.*—As subpœnas issued by the clerks of the peace at sessions, or of assize at assizes, are only effectual within their respective jurisdictions, it is necessary when the witness is resident beyond these limits to obtain a Crown Office subpœna, which is available in any part of the United Kingdom (45 Geo. 3, c. 92, ss. 3, 4). The attendance before a magistrate of witnesses resident "in England" beyond the jurisdiction is effected by means of a summons issued by such magistrate, and backed by another in the witness's district (Summary Jurisdiction Act, 1879, s. 36); and their attendance when in "England, Wales, Ireland, Scotland, or the Channel Islands" may be enforced by warrant backed by any justice of such locality (11 & 12 Vict. c. 42, ss. 11–16; *id.* c. 43, ss. 3, 7); or in either case by means of a Crown Office subpœna.

SERVICE OF PROCESS.—Subpœna.—Service of a subpœna issued by the High Court, or by a Court of Assize or Quarter Sessions, is effected by personally delivering to the witness a copy of the writ and of the indorsement thereon, and at the same time producing the original (O. 37, r. 32; Tay. s. 1244; Ros. Cr. Ev. 101). The service must be made within twelve weeks from the *teste* of the writ (O. 37, r. 34), and a reasonable time before the trial; service on the day of trial, even where the witness resides in the same town, not being sufficient unless he is actually within the precincts of the Court, or has admitted the sufficiency of the service, as by promising to attend (Maunsell *v.* Ainsworth, 8 Dowl. 869). The subpœna remains in force until the end of the sitting or assize for which it is issued; after which the former writ must be re-issued and re-served, or a new one obtained (Tay. s. 1241). The service may be proved by affidavit (O. 37, r. 33; Tay. s. 1244).

Summons.—An ordinary witness summons issued without leave by the *County Court* is served by the bailiff; but it may, by leave of the judge or registrar, be issued in blank

and served by the party applying for the same, or by his solicitor, or by some person in the permanent and exclusive employment of the party or his solicitor (C. C. Act, 1888, s. 110; C. C. R. 1889, O. 18, r. 1). The service should be effected personally, or by delivering it to some person apparently of the age of sixteen, at the house, or place of dwelling, or place of business of the witness; but no place is to be deemed his place of business unless he is the master, or one of the masters, of it (C. C. R. 1889, O. 7, r. 9*a*; Heywood C. C. Pr. 202). Proof of service may be by indorsement on the copy (O. 2, r. 22). Service of a *Police Court* summons may be effected by "a constable, peace-officer, or other person," by leaving it with the witness, or with some person for him, at his last or most usual place of abode (11 & 12 Vict. c. 43, s. 1)—*e.g.*, service upon a servant apparently residing at the witness's address coupled with an explanation of its purport, is sufficient (R. *v.* Chandler, 14 East 267). Proof of such service may be by declaration before a justice, commissioner for oaths, clerk of the peace, or registrar of a County Court (42 & 43 Vict. c. 49, s. 41; Greenwood's Police Guide, 37–38, 41).

Attendance waives Irregularity.—Attendance in obedience to a subpœna or summons will waive any irregularity in the service thereof (Wisden *v.* Wisden, 6 Beav. 549; R. *v.* Widdop, L. R. 2 C. C. R. 3; R. *v.* Fletcher, 51 L. T. 334).

TENDER OF EXPENSES.—Civil Cases.—In civil cases a witness is not bound to attend unless his reasonable expenses of going to, staying at, and returning from the place of trial are tendered to him, either with his subpœna, or at a reasonable time before the trial (Dowdell *v.* Australian Co., 3 E. & B. 909; Brocas *v.* Lloyd, 23 Beav. 129; though he cannot refuse for non-payment for former attendances, Gaunt *v.* Johnson, 6 Beav. 551). Nor, if he attends (which as we have seen waives any irregularity in the service of the process), is he bound to give evidence unless such expenses, together with, in the case at any rate of professional witnesses, compensation for loss of time, are paid or tendered to him; and this seems to hold even though he has been already sworn (*Re* Working Man's M. Soc., 21 Ch. D. 831, *sed qu.*, and see Ros. N. P. 153). But payments made by one side may be taken into account on a

subpœna from the other (Allen *v.* Yoxall, 1 C. & K. 315; Betteley *v.* McLeod, 3 Bing. N. C. 405); and witnesses may waive their right to a tender of expenses, either expressly as by agreeing to take a less sum, or to bear their own expenses (Batteley *v.* McLeod, *supra*; Goff *v.* Mills, 13 L. J. Q. B. 227); or impliedly, as by accompanying the parties to the place of trial without making any previous claim (Newton *v.* Harland, 1 M. & G. 956; Tay. s. 1249).

If a party attends on his own account, he is not entitled to conduct money when subpœnaed by his adversary; though a successful party who is a necessary witness in his own cause will on taxation be entitled to his expenses.

Where the witness is a married woman the tender should be made to her and not to her husband (Tay. s. 1249).

Criminal Cases.—In *Indictable Offences* a witness living within the jurisdiction is bound to attend when subpœnaed or summoned by the Crown or prisoner without any tender of expenses (Pell *v.* Daubeney, 5 Ex. 957; R. *v.* Cooke, 1 C. & P. 321); but power is given to the Court in all cases of felony, and in many of misdemeanour, to order payment of their expenses to Crown witnesses attending on recognizance or subpœna, and to witnesses for the prisoner attending on recognizance (Tay. ss. 1252–1263; Ros. Cr. Ev. 223–227).

Witnesses residing in a distinct part of the United Kingdom *without the jurisdiction*, cannot be punished for contempt unless at the time of service a sufficient sum was tendered to them for their expenses in coming, attending, and returning (45 Geo. 3, c. 92, s. 4; and see 44 & 45 Vict. c. 24, s. 4, sub-s. 3; and 44 & 45 Vict c. 69, ss. 15 & 27).

In *Summary Cases* a witness is not bound to attend unless paid his expenses with his summons, nor can a warrant issue unless such payment has been made (11 & 12 Vict. c. 43, s. 7).

DISOBEDIENCE TO PROCESS. Subpœna.—Wilful failure to attend a trial, in obedience to a subpœna issued by the High Court, is a contempt, and punishable in both civil and criminal cases by *attachment* (Tay. ss. 1265–1269; Ros. Cr. Ev. 103-104); as well as, in civil cases, by an *action of debt* wherein the aggrieved party may recover a penalty of £10,

with such further compensation as the Court issuing the process may assess (5 Eliz. c. 9, s. 12, made perpetual by 26 & 27 Vict. c. 125, Tay. s. 1270); or, as is more usual, an action at Common Law for damages (Tay. s. 1271; Archb. Pr. 568-570).

If a witness, duly served and having his expenses paid, refuses in Court to be sworn, or to answer, he is also guilty of a contempt, and may, in the Superior Courts, be punished instanter, by fine and imprisonment (R. *v.* Fernandez, 10 C. B. N. S. 3; R. *v.* Clement, 4 B. & Ald. 218).

So, if a witness subpœnaed before an examiner, refuses to attend, or, having attended, refuses to be sworn or to answer any lawful question, such refusal may be certified to the central office by the examiner; and the Court may, on the application of the aggrieved party, made either *ex parte*, or on notice, order the witness to attend, or be sworn, or answer, as the case may be (O. 37, r. 13; Stuart *v.* Balkis Co. 32 W. R. 676; *ex parte* Fernandez, 30 L. J. C. P. 320, *post*, p. 330). And the same practice applies where a witness is summoned by the Chief clerk under O. 55, r. 17 (Powell *v.* Nevitt, 55 L. T. 729).

Where the subpœna has been issued not by the High Court, but by a Court of Assize or Quarter Sessions, a non-attending witness may be fined, or indicted (R. *v.* Clement, 4 B. & Ald. 218; Tay. s. 1268; Ros. Cr. Ev. 104); and an attending witness, who refuses to be sworn or to answer, may be committed, or fined, and imprisoned until the fine is paid (Ros. Cr. Ev. 104; R. *v.* Preston, 1 Salk. 278).

Disobedience to a subpœna issued *out of the jurisdiction* in Scotland or Ireland under 45 Geo. 3, c. 92; or 17 & 18 Vict. c. 34, *ante*, pp. 313, 314, may be certified to, and punished by, the Superior Courts of those countries (Archb. Pr. 570–571).

Recognizance.—If a witness refuses to be bound over, he may be committed (11 & 12 Vict. c. 42, s. 20); and if he fails to appear, after being bound, his recognizance may be forfeited and the penalty levied. (As to the practice in such cases see Tay. s. 1235; Ros. Cr. Ev. 99-100).

Summons.—Failure to attend, or refusal to give evidence or produce documents, in pursuance of a County Court summons, subjects the witness to such penalty, not exceeding £10, as the judge may think proper (C. C. Act, 1888,

s. 111). Obedience to a magistrate's or justice's summons is enforceable by warrant; and if the witness refuses to be sworn, or to answer, he may be committed for not more than seven days (11 & 12 Vict. c. 42, s. 16; c. 43, s. 7). Obedience to a summons may also be enforced by warrant in Bankruptcy Cases (Bankruptcy Act, 1883, s. 27, sub-s. 3) and under the Companies Act, 1862, ss. 115, 126, 138.

PROTECTION OF WITNESSES.—In order to encourage the giving of voluntary testimony, witnesses are protected from *arrest on civil process* "eundo, morando, et redeundo" (Tay. ss. 1330–1340). This protection applies to attendance in good faith, even without a subpœna; and extends to a reasonable time for coming and returning, as well as to the time occupied by the witness in waiting for the trial to come on. Thus a witness who comes to town to be examined, is protected the whole time he *boná fide* remains there for that purpose; though it is otherwise with a witness who already resides in the town (Gibbs *v.* Phillipson, 1 R. & M. 19). There is no protection, however, from *arrest on criminal process*.

As to the protection of witnesses in respect of evidence given before Parliamentary Committees, see 55 & 56 Vict. c. 64; and as to protection from actions for defamation in respect of their testimony, see Seaman *v.* Netherclift, 2 C. P. D. 53.

[Tay. ss. 1330–1341; Ros. Cr. Ev. 105; Ros. N.P. 153; Powell, 478–479].

CHAPTER XL.

COMPETENCY, COMPELLABILITY, OATH, AND AFFIRMATION.

COMPETENCY.—With two exceptions, all persons are now competent to give evidence in judicial proceedings, including the *Sovereign* (Tay. s. 1381; Berkeley Peerage, Times, June 27th, 1891); the *parties* in civil cases, and their wives and husbands (14 & 15 Vict. c. 99, ss. 2, 3; 16 & 17 Vict. c. 83, ss. 1, 2; 28 & 29 Vict. c. 104, s. 34); *persons interested* in the result (6 & 7 Vict. c. 85, s. 1); *believers* of all creeds, as well as *Atheists* (providing they comply with the provisions of the Oaths Act, 1888, *infra*); *deaf mutes* (Tay. s. 1376; Steph. art. 107); *accomplices;* and *convicts* (6 & 7 Vict. c. 85, s. 1; for a recent case, see R. *v.* Dytche, 17 Cox 39; even a murderer under sentence of death is competent, R. *v.* Fitzgerald, Dublin, Nov. 6, 1884, *per* Harrison, J., cited Tay. Add. p. cxxv., not following R. *v.* Webb, 11 Cox 133, *contra*, which case is also doubted by Mr. Taylor, p. 1142, *note* 2, and Mr. Justice Stephen, art. 107, *note*). Objections on the ground of interest and crime, which used to affect competency, now go merely to credit.

(1) **Exception as to Defective Intellect.**—No witness is competent who is prevented from *infancy*, *lunacy*, *drunkenness* and the like, from understanding the nature of an oath, and from giving rational testimony.

But the incapacity is only co-extensive with the defect; thus, a lunatic is competent during a lucid interval, a monomaniac upon all subjects save the one, a drunkard upon his return to sobriety (R. *v.* Hill, 2 Den. 54; Spittle *v.* Walton, L. R. 11 Eq. 420; Tay. s. 1375). And where the incapacity is merely temporary the judge may, in his discretion, provided the application be made before the jury are sworn, postpone

the trial until it is removed (R. *v.* Wade, 1 Moo. C. C. 86; R. *v.* White, 1 Lea. 430, *n.*)

Infancy.—No precise rule can be laid down as to the limit of age, or degree of knowledge and intelligence, which will exclude the testimony of infants. Children of six (R. *v.* Holmes, 2 F. & F. 788; R. *v.* Perkins, 2 Moo. C. C. 139), or even five years of age (R. *v.* Brasier, 1 Lea. 199), have been allowed to testify upon the Court being satisfied of their capacity. But in R. *v.* Forsyth, L. T. vol. xciii., 274 (1892), the testimony of a girl of seven was rejected; and in R. *v.* Pike, 3 C. & P. 598, the dying declarations of a girl of four, the Court remarking it was impossible that her understanding could be sufficient for the purpose. A child destitute of religious education has been allowed to be qualified therein with a view to the trial (R. *v.* Murphy, 1 Lea. 4th ed. 430, *n.*; R. *v.* Milton, Ir. Cir. Rep. 61; *contra*, R. *v.* Williams, 7 C. & P. 320, has been doubted; and in R. *v.* Nicholas, 2 C. & K. 246, though an application to postpone the trial for this purpose was rejected, Pollock, C.B., considered there were cases in which it might be granted). [Tay. s. 1377; Ros. N. P. 161; Ros. Cr. Ev. 106–109; Steph. art. 107.] As to the reception of unsworn testimony by children under the Criminal Law Amendment Act, 1885, and the Prevention of Cruelty to Children Act, 1889, see *infra*.

Objections to competency used to be decided by the judge examining the witness on the *voir dire* (*i.e.*, *vrai dire*), the witness being sworn to answer truly all such questions as the Court should demand of him; but since, if he can be sworn on this examination, he can also be sworn in chief, and if incompetent on the latter, he must be so on the former, the test is not very satisfactory. The modern practice is to interrogate the witness before swearing him, or to elicit the facts upon the examination in chief, when, if his incompetency appears, the evidence will be rejected (R. *v.* Whitehead, L. R. 1 C. C. R. 33; Tay. s. 1393; Whart. s. 492).

(2) **Exception as to Criminal Proceedings.**—In criminal cases the accused and any person jointly indicted and jointly tried with the accused (but not separately tried, Winsor *v.* R., L. R. 1 Q. B. 390; R. *v.* Bradlaugh, 15 Cox 217), and the wife or husband of either, are in general incompetent as witnesses (R. *v.* Payne, L. R.

1 C. C. R. 349; R. *v.* Thompson, *id.* 377). Revenue proceedings in the Q. B. D. are not criminal within the rule (39 & 40 Vict. c. 36, s. 259); nor are charges before justices not resulting in summary conviction—*e.g.*, affiliation cases (R. *v.* Lightfoot, 6 E. & B. 822).

The above persons are, however, competent in the following cases:—

(1) Where the charge is one of personal violence towards the wife or husband of the accused, such wife or husband is a competent witness (Reeve *v.* Wood, 34 L. J. M. C. 15; Tay. s. 1371). And in any criminal proceeding against a husband or wife authorised by the Married Women's Property Act, 1882, ss. 12, 16, the husband and wife respectively are competent and admissible witnesses, and, except when defendants, compellable to give evidence (47 & 48 Vict. c. 14, s. 1). (2) Under the Conspiracy and Protection of Property Act, 1875, s. 11, the wives or husbands of servants charged with breach of contract, either relating to the supply of gas and water (s. 4), or involving injury to person or property (s. 5), and the wives of masters (or husbands of mistreses?) neglecting to provide their servants or apprentices with necessary food, &c., are competent witnesses. (3) Under the Merchant Shipping Act, 1876, s. 4, persons charged with sending or taking unseaworthy ships to sea may give evidence in the same manner as any other witness. (4) Under 40 & 41 Vict. c. 14, on the trial of indictments for non-repair of public highways and bridges, or for nuisance connected therewith, defendants and their wives or husbands are competent and compellable witnesses. (5) Under the Explosives Act, 1883, s. 4 (2), a person, or the wife or husband of a person, charged under s. 4 (1) with the possession of explosives under suspicious circumstances (but not persons charged under other sections of the Act) may, if such person thinks fit, be sworn, &c., as an ordinary witness. (6) Under the Corrupt Practices Prosecution Act, 1883, s. 53, sub-s. 2, the person prosecuted, and the husband or wife of such person may, if he or she think fit, be examined as an ordinary witness in the case. (7) Under the Criminal Law Amendment Act, 1885, s. 20, persons charged with offences under that Act, or under s. 48 and ss. 51 to 55, both inclusive, of 24 & 25 Vict. c. 100, and their husbands or wives, are competent but not compellable

witnesses (see R. *v.* Owen, 20 Q. B. D. 829). (8) Under the Merchandise Marks Act, 1887, s. 10, defendants and their wives or husbands are competent witnesses; and so, also (9), under the Libel Amendment Act, 1888, s. 9; and (10) the Prevention of Cruelty to Children Act, 1889, s. 7.

Defendants and their wives or husbands are also competent witnesses in summary proceedings taken under the Mines Regulation Act, 1872, s. 63; the Metalliferous Mines Regulation Act, 1872, s. 34 (4); the Licensing Act, 1872, s. 51 (4); the Sale of Food and Drugs Act, 1875, s. 21; and the Explosives Act, 1875, s. 87.

COMPELLABILITY.—All witnesses competent to give evidence are in general compellable to do so. To this rule the Sovereign forms an exception (Best, ss. 125, 183; Tay. s. 1381; and also it seems ambassadors of foreign States, Dana's Wheaton, *notes* 125, 129). So, in most cases where prisoners and their wives are rendered competent to testify they are not compellable (*supra*). And, under the Bankers' Books Evidence Act, 1879, s. 6, bankers, when not parties to the proceedings, can, as we have seen, only be compelled to produce, or to appear as witnesses to prove, their books by order of a judge for special cause (*ante*, p. 249).

Compellability to be sworn must be distinguished from compellability when sworn to answer questions; as to privilege in the latter case, see fully *ante*, pp. 93–116.

OATH AND AFFIRMATION.—Subject to the two exceptions mentioned, *infra*, p. 325, oral evidence must in all cases be given under the sanction of an oath or solemn affirmation, the administration of which will vary according as the witness has, or has not, a religious belief.

Believers.—When it appears that a witness has a religious belief he must either be *sworn* (in the usual way, or some other that he declares to be binding upon him, see *infra*, Form of Oath); or "if he objects to be sworn, and states as the ground of such objection that the taking of an oath is contrary to his religious belief," he will be allowed to *affirm* (Oaths Act, 1888, s. 1). It is the duty of the judge, however, to see that the statutory conditions are strictly complied with before permitting an affirmation (R. *v.* Moore,

61 L. J. Q. B. 80; Nash *v.* Ali Khan, 8 Times L. R. 444); and if the witness objects on grounds other than the above, or, though not objecting to an oath, considers it not binding upon him, and will not state what form is binding, he cannot affirm (Nash *v.* Ali Khan, *supra*); nor can he, it is presumed, if he is too young to object.

Atheists.—The testimony of an atheist is receivable (1) if he has been *sworn without objection* (Oaths Act, 1888, s.3: the words of the section are, "Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief shall not for any purpose affect the validity of such oath"). (2) "If he objects to be sworn, and states as the ground of such objection that he has no religious belief," in which case he will be *allowed to affirm* (*id.* s. 1).

Form of Oath.—Oaths are binding which are administered in such form and with such ceremonies as the witness may declare to be binding (1 & 2 Vict. c. 105, s. 1); and in order to ascertain what form is so binding the judge should inquire from the witness himself before he is sworn (Tay s. 1388).

Usual Form.—The usual form of swearing in jury trials, is for the witness to hold the New Testament in his bare right hand, the officer of the Court addressing him, in civil cases, thus:—"The evidence that you shall give to the Court and jury *touching the matter in issue*, shall be the truth, the whole truth, and nothing but the truth, so help you God." The witness then kisses the book. In criminal cases, the form is the same, except that instead of the words in italics, the words "sworn between our Sovereign Lady the Queen and the prisoner at the bar" (or "defendant," where the accused is not in custody), are substituted.

The form of oral affirmation provided by the Oaths Act, 1888, s. 2, is as follows:—"I, A.B., do solemnly, sincerely, and truly declare and affirm," and then proceed with the words of the oath prescribed by law, omitting any words of imprecation, or calling to witness.

If a witness has, without objection, been sworn in the usual form, no subsequent objection can be taken to his testimony, on the ground that he has no religious belief (Oaths Act, 1888, s. 3, *supra*); or that, being of a different faith, the

oath is not in a form affecting his conscience (Sells *v.* Hoare, 3 B. & B. 232; Tay. s. 1388 and *note*); or that some other form is more binding (The Queen's case, 2 B. & B. 284).

Scotch Form.—If a witness desires to swear with uplifted hand in the form usual in Scotland, he shall be permitted to do so, without further question (Oaths Act, 1888, s. 5; see R. *v.* Mildrone, 1 Lea. 412).

Other Forms.—In Ireland, Roman Catholics are sworn upon the New Testament with a crucifix or cross upon it (McNall, Ev. 97). A Methodist, on objecting to be sworn on the New Testament, was allowed to be sworn on the Old (Edmunds *v.* Rowe, R. & M. 77). Jews are sworn on the Pentateuch, with head uncovered (Willes 543); Mahomedans on the Koran (Morgan's case, 1 Lea. 54); Hindoos on the Vedas, or other sacred books; a member of a sect which objects to the ceremony of kissing, may be sworn without it (Mee *v.* Reade, Peake C. 23); the Chinese are usually sworn by the ceremony of breaking a saucer previously to the administration of the oath (R. *v.* Entrehman, C. & M. 248; another form being for the witness to write sacred characters upon paper, which he burns, praying that his soul may be similarly burnt if he swears falsely; while the most solemn form of all is said to consist in the witness cutting off a cock's head with a similar invocation).

Who may Administer Oaths.—*In England*, every Court, judge, justice, officer, commissioner, arbitrator, or other person now or hereafter having by law or by consent of parties, *authority to hear, receive, and examine evidence*, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively" (14 & 15 Vict. c. 99, s. 16; Tay. s. 1386; Steph. art. 124); and by the Commissioners for Oaths Act, 1889, s. 2, "every person who being an officer of, or performing duties in relation to any Court, is for the time being so authorised by a judge, or by any rules or orders regulating the procedure of the Court, and every person directed to take an examination in any cause or matter in the Supreme Court, may administer an oath."

The above provisions include, *inter alios*, examiners (O. 37, r. 19); chief clerks in Chancery (O. 55, rr. 16, 17); Taxing Masters (O. 65, r. 27, sub-s. 25); Masters and first or second

class Clerks in the Filing or Record Department (O. 61, r. 5); official receivers in bankruptcy (Bpy. Act, 1883, s. 68, sub-s. 2); and trustees in relation to proofs (*id.* Sched. II. r. 26).

In general, a solicitor's commission only lasts so long as he continues to practise; but in certain cases it continues until revoked. When the latter is the case, he may administer an oath, although struck off the rolls (Ward *v.* Gamgee, 65 L. T. 610).

Under the Commissioner for Oaths Act, 1889, s. 1 (3), a commissioner may not act in any proceeding in which he is (or is the clerk of) the solicitor to *any of the parties*, or *in which he is interested*. O. 38, rr. 16, 17, provide that no affidavit is sufficient, if sworn before the party using it, or his solicitor, or the latter's agent, correspondent, clerk, or partner.

Out of England.—With respect to affidavits, &c., sworn out of England, but required for use therein, oaths may be administered by any person having authority to administer an oath in that place (Commissioner for Oaths Act, 1889, s. 3, sub-s. 1); and where such authority is conferred otherwise than by the law of a foreign country, judicial notice will be taken of the seal or signature of the persons so authorised (s. 3, sub-s. 2; see *ante*, pp. 9, 10).

Such last-mentioned persons are—in *Scotland, Ireland, the Channel Islands and Colonies*—any judge, Court, notary public or other person lawfully authorised for the purpose (O. 38, r. 6); and in *foreign countries*—the various British diplomatic and consular agents therein (C. O. Act, 1889, s. 1; C. O. Act, 1891, s. 2).

When Witness need not be Sworn.—(1) *Children.*—Under the Criminal Law Amendment Act, 1885, s. 4, and the Prevention of Cruelty to Children Act, 1889, s. 8, it is provided that the unsworn evidence of children of tender age shall be admissible in proceedings under those Acts when the Court is satisfied that such children "do not understand the nature of an oath," but are "possessed of sufficient intelligence to justify the reception of the evidence and to understand the duty of speaking the truth." Such testimony, however, must be *corroborated*, and is *punishable if false*.

Where such evidence was received in support of a charge under s. 4 of the former Act, of unlawfully and carnally

knowing a girl under thirteen, and the prisoner was acquitted of that charge, but, under the provisions of s. 9, was convicted in the alternative of an indecent assault; the conviction was upheld, although such evidence would have been inadmissible upon the latter charge *per se* (R. *v.* Wealand, 20 Q. B. D. 827; and see R. *v.* Owen, *id.* 829). Where, however, a prisoner was charged in one count with an *attempt* to commit the felony specified in s. 4, and in a separate count with an indecent assault—and being acquitted of the former, was found guilty of the latter upon unsworn evidence—the conviction was quashed upon the ground that the jury had no power under the former count to convict alternatively of an indecent assault, and therefore that the reception of evidence inadmissible under the latter *per se* was fatal (R. *v.* Paul, 25 Q. B. D. 202).

(2) *Witness merely Producing Document.*—A witness called merely for the purpose of producing a document need not be sworn (Perry *v.* Gibson, 1 A. & E. 48; Tay. s. 1429).

CHAPTER XLI.

EVIDENCE TAKEN BEFORE TRIAL.—AFFIDAVITS, DEPOSITIONS, INTERROGATORIES, COMMISSIONS.

CIVIL CASES.—In civil proceedings oral evidence may be taken out of Court, for subsequent use in Court, in the following cases:—

(1) **Affidavit Evidence by Agreement.**—The parties may agree to try the case upon affidavit (O. 37, r. 1; O. 38, rr. 25–30). Such an agreement, which is equivalent to a consent to try before a judge alone (Brooke *v.* Wigg, 8 Ch. D. 510), must be in writing signed by the solicitors of all the parties (or of their guardians, &c., if the parties are under disability, see Knatchbull *v.* Fowle, 1 Ch. D. 604; Fryer *v.* Wiseman, 45 L. J. Ch. 199; or by the parties themselves if they have no solicitors, Tay. s. 1394); and unless specifying that the evidence is to be by affidavit *alone*, it may be supplemented by *vivâ voce* testimony (Glossop *v.* Heston &c. Local Board, 47 L. J. Ch. 536; A.-G. *v.* Pagham &c. Co., W. N. 1876, 94).

If either party is unable to procure affidavits, he may apply to be relieved of his agreement, and to have the evidence taken wholly or partially *vivâ voce* (Warner *v.* Mosses, 16 Ch. D. 100; Winfield *v.* Shoolbred, W. N. 1880, p. 192); or the unwilling witness may be ordered to attend for examination in Court, but not, so long as the agreement stands, before an examiner (*id.*; Nadin *v.* Bassett, 25 Ch. D. 21). Moreover the Court itself, where the affidavits are unsatisfactory or the interests of justice require it, may exclude the affidavits and order the witnesses to be examined orally (Lovell *v.* Wallis, 53 L. J. Ch. 494; Lawson *v.* Quare, 32 S. J. 24; *Re* Whiteley, 1891, 1 Ch. p. 559).

Unless otherwise agreed or ordered, the plaintiff must file, and deliver to the defendant, a list of his affidavits

within fourteen days from the date of the consent; and the defendant his within fourteen days from such delivery (O. 38, rr. 25, 26); the plaintiff must then file his affidavits in reply within seven days from the last-mentioned fourteen days, or such other time as aforesaid, and such affidavits must be confined to matters strictly in reply (O. 38, r. 27); if at the hearing they turn out not to fulfil the latter condition, the Court will disregard them, or give the defendant leave to answer (Gilbert *v.* Comedy Opera Co., 16 Ch. D. 594, explaining Peacock *v.* Harper, 7 Ch. D. 648; see Adair *v.* Young, W. N. 1879, p. 8; Roe *v.* Davies, 2 Ch. D. 731).

Either party may within fourteen days after the time limited for such reply, or otherwise appointed, serve upon his opponent notice requiring the production of an affidavit witness for cross-examination at the trial, and in default of such production the affidavit cannot be read unless by special leave (O. 38, r. 28; Meyrick *v.* James, 46 L. J. Ch. 579; as to the death, &c., of the deponent, see *post* pp. 329, 355); or unless the notice omits to comply with the rule, or to state when, where, and before whom the examination is to take place (De Mora *v.* Concha, 32 Ch. D. 133; affirmed *sub nom.* Concha *v.* Concha, 11 App. Cas. 541).

(2) **Affidavit Evidence in Admiralty Cases.**—In default actions *in rem*, and in references in Admiralty actions, evidence may be given by affidavit (O. 37, r. 2).

(3) **Affidavit Evidence by Order of the Court.**—Under O. 37, r. 1, the Court or a judge may at any time, for sufficient reason, order (*a*) that *any particular fact or facts may be proved by affidavit.* In pursuance of this rule, upon an inquiry as to damages for breach of a charter-party, evidence of witnesses in New South Wales was ordered to be given by affidavit (Macdonald *v.* Antelme & Co., W. N. 1884, 72). And in an action for revocation of probate, the affidavit of an attesting witness who could not be found, made eight years before on obtaining probate, was received in support of the will (Gornal *v.* Mason, 12 P. D. 142, per Butt, J.); so in Drewitt *v.* Drewitt, 58 L. T. 684, an affidavit made previously in a motion in the cause was allowed to be read by the same judge, the deponent being engaged as a witness in another trial. On the other hand, proof of a will in solemn form by affidavit has been disallowed, although the property was small, and the parties cited did not appear

(Cooke *v.* Tomlinson, 24 W. R. 851, per Hannen, J.); or (*b*) that *the affidavit of any witness may be read at the hearing* or trial, on such conditions as the Court or a judge may think reasonable (see Gornal *v.* Mason, *supra;* Drewitt *v.* Drewitt, *supra.* As to reading affidavits in former causes, see O. 37, r. 3, and notes thereon in the Annual Practice; and for the common law rules, see depositions in former trials, *ante*, p. 305); or (*c*) that any *witness whose attendance in Court ought, for some sufficient cause, to be dispensed with*, be examined by interrogatories or otherwise before a commissioner or examiner (*e.g.*, the examination of a witness dangerously ill, the evidence being only receivable at the trial if the witness is incapable of being examined thereat, Burton *v.* North Staff. Ry. Co., 35 W. R. 536).

Provided, that where it appears to the Court or a judge that the other party *bonâ fide desires the production of a witness for cross-examination, and that such witness can be produced*, an order shall not (in any of the three cases mentioned above, Blackburn Union *v.* Brooks, 7 Ch. D. 68) be made authorising the evidence of such witness to be given by affidavit (O. 37, r. 1; Nadin *v.* Bassett, 25 Ch. D. 21). If the other party does not *bonâ fide* desire the production of the witness (Blackburn Union *v.* Brooks, *supra;* Elias *v.* Griffith, 46 L. J. Ch. 806); or the witness cannot be produced (Gornal *v.* Mason, *supra;* Burton *v.* North Staff. Ry. Co., *supra;* and see *post*, p. 355), the proviso does not apply.

By O. 37, r. 5, the Court or a judge may, in any cause or matter where it may be *necessary for the purposes of justice*, make any order for the examination upon oath before the Court or judge, or any officer of the Court, or any other person (or for the cross-examination of an affidavit witness, De Mora *v.* Concha, 32 Ch. D. 133), and may empower any party to such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct.

An order to examine witnesses *de bene esse* will in general only be made where they are going, or have gone, abroad, or where, from age, illness, infirmity, or some other cause, they are likely to be unable to attend at the trial (Warner *v.* Mosses, 16 Ch. D. 100; Bidder *v.* Bridges, 26 Ch. D. 1; Tay. s. 509). As to the procedure with respect to the

examination of such witnesses in England and abroad, see a series of articles on Evidence by Commission, Sol. Jour. Aug. 3 to Nov. 7, 1891; and Annual Practice, notes to O. 37, r. 5.

O. 37, r. 18, is as follows:—"Except where by this order otherwise provided, or directed by the Court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter *without the consent* of the party against whom the same may be offered, *unless* the Court or judge is satisfied that the deponent is—(1) *dead;* or (2) *beyond the jurisdiction* of the Court; or (3) *unable from sickness or other infirmity* (which does not mean an incurable malady, but will be satisfied by any serious illness, Beaufort *v.* Crawshay, L. R. 1 C. P. 699, *ante*, p, 308, and may, perhaps, be proved by affidavit, Tay. s. 517) *to attend* the hearing or trial; in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible, *saving all just exceptions*, without proof of the signature to such certificate."

Though the opening words of this rule confer very extensive powers upon the Court, it is probable that in practice the admissibility of the depositions will be confined to those cases in which the personal attendance of the witness is from some of the causes mentioned unattainable (Bagot v. Bagot, 1 L. R. I. 1; Nadin *v.* Bassett, 25 Ch. D. 21; Burton *v.* North Staff. Ry. Co. 35 W. R. 536; Tay. s. 516; Powell 565).

Unwilling Deponent.—Where a witness refuses to attend an examination, or to be sworn, or to answer, the proper course is not to move to commit him for contempt, but to serve him with a *subpœna*, and if he fails to comply, then to move for an order directing him to attend, or to be sworn, or to answer, as the case may be (O. 37, rr. 8, 13; Stuart *v.* Balkis, 32 W. R. 676; *Ex parte* Fernandez, 30 L. J. C. P. 320, *ante*, p. 317). If, however, an affidavit witness has voluntarily attended an appointment for cross-examination, the necessity for a *subpœna* or order is waived, and he may be committed for not answering questions (Cutler *v.* Wright, W. N. 1890, 28).

A witness who refuses to make an affidavit may, as we have seen, be ordered to attend for examination in Court, though not before an examiner (*ante*, p. 327).

Objections to Depositions.—"Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question" (O. 37, r. 12). "If any witness shall object to any question that may be put to him, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the central office to be there filed, and the validity of the objection shall be decided by the Court or a judge" (O. 37, r. 14). But though an examiner has no power to decide an objection, or compel an answer, he may allow a witness to be treated as hostile (Ohlsen *v.* Terrero, 10 Ch. Ap. 127; *contra*, Buckley *v.* Cooke, 1 K. & J. 29; Tay. s. 1427); or to be examined apart (*Re* West Canada &c. Co. 46 L. J. Ch. 683).

Objections to evidence on commission should be taken before the examiner; for if received by him without objection, the evidence cannot afterwards be rejected (Robinson *v.* Davies, 5 Q. B. D. 26, where secondary evidence of documents had been improperly received; Richards *v.* Hough, 51 L. J. Q. B. 361, where the witness had been improperly allowed to affirm).

If, after objection, admissible evidence has been rejected, or inadmissible evidence received, the judge may suppress the depositions either wholly or in part (Robinson *v.* Davies, *supra*; Ros. N. P. 186; Tay. ss. 512, 548; Lumley *v.* Gye, 3 E. & B. 114; Hutchinson *v.* Bernard, 2 M. & Rob. 1; Small *v.* Nairne, 13 Q. B. 840; *ante*, Depositions in Former Trials, p. 309).

[Tay. ss. 506–549; 1394–1398; Ros. N. P. 184–187; Annual Practice, notes to O. 37; Powell 556–574; Steph. art. 125.]

(4) **Depositions in Bankruptcy.**—"In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any Court in any proceeding in bankruptcy, the deposition of the person so deceased purporting to be sealed with the seal of the Court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to" (Bankruptcy Act, 1883, s. 136).

(5) **Depositions under the Merchant Shipping Act, 1854,**

s. 270.—In proceedings under this Act, or any Act amending the same, a deposition made *out* of the United Kingdom on oath in relation to the same subject-matter before any judge, &c., is admissible upon proof that the witness cannot be found *in* the United Kingdom (R. *v.* Conning, 11 Cox 134; R. *v.* Anderson, *id.* 154; R. *v.* Stewart, 13 Cox 296; Steph. art. 142; *post*, p. 342).

The deposition must be authenticated by the signature of the judge, &c., but his signature or official character need not be proved.

If the proceeding is criminal, the judge must certify that the accused was present; which certificate is, unless the contrary be proved, sufficient evidence of that fact.

(6) **Interrogatories.**—Under O. 31, r. 1, the plaintiff or defendant, in any cause or matter not of a penal nature, may by leave (and in actions for fraud or breach of trust without leave) deliver interrogatories in writing for the examination of the opposite party (*i.e.*, one between whom and the applicant an issue is joined, and not a mere third party, Molloy *v.* Kelly, 15 Ch. D. 162; Eden *v.* Weardale, 35 Ch. D. 287) as to any matter in question between them, but not as to matters which would be admissible only in cross-examination. And by O. 31, r. 24, any party may at the trial use in evidence any one or more of the answers, or any part of an answer of the opposite party, without putting in the others, or the whole of such answer, *provided* always that the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the latter ought not to be used without them, he may direct them to be put in. The judge, however, ought not to allow a party who has made an admission in an answer, to read with it any other part of the answer which is not fairly connected with it in sense or substance (Lyell *v.* Kennedy, 27 Ch. D. 1, 15, per Cotton, L.J.).

(7) **Evidence on Motion, Further Consideration, and in Chambers.**—"Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a judge may on the application of either party order the attendance for cross-examination of the person making such affidavit" (O. 38, r. 1). "The party intending to use any affidavit in support of any application made by him in the Chancery

Division, shall give notice to the other parties concerned of his intention in that behalf" (O. 38, r. 20).

O. 37, r. 25 provides that "All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceeding in the same cause or matter"; and O. 38, r. 21, adds, somewhat tautologically, that "all affidavits which have been previously made and read in Court upon any proceeding in a cause or matter may be used before the judge in chambers." An undertaking not to use an affidavit at the hearing does not, however, preclude its use on a subsequent inquiry in chambers (Jenner *v.* Morris, 10 W. R. 640).

Where it is intended to read, upon further consideration, evidence previously used in chambers, notice to the parties to be affected must be given (Jones *v.* Chennell, 8 Ch. D. 492; Brier *v.* Evison, 26 Ch. D. 238); but further evidence may also be read by leave of the Court under O. 37, r. 1 (May *v.* Newton, 34 Ch. D. 347); and evidence to influence costs may be given by affidavit (see Beaney *v.* Elliott, W. N. 1880, 99; Evans *v.* Lewis, 2 L. T. N. S. 559; *Re* Michael, 52 L. T. 609; *Re* Revill, 55 L. T. 542).

As to the admission of further evidence on appeals, see O. 58, r. 4, and notes thereto in the Annual Practice.

CRIMINAL CASES.—In criminal proceedings oral evidence taken before the trial is admissible thereon in the following cases:—

(1) **Depositions before Magistrates.**—*Witnesses for the Prosecution.*—By 11 & 12 Vict. c. 42, s. 17, it is enacted that in all cases where any person shall be charged before any justice of the peace with any indictable offence, "such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing; and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom

any such witness shall appear to be examined as aforesaid shall, before such witness be examined, administer to such witness the usual oath or affirmation, which such justice shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel; and if, also, it is proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to be taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.—*Witnesses for the Defence.* —By 30 & 31 Vict. c. 35, s. 3, every person who is charged before a justice with an indictable offence shall be asked whether he desires to call any witnesses; and if he does so, the justice in his presence shall take the statement on oath or affirmation, both examination and cross-examination of such witnesses, and reduce the same to writing; and "such depositions of such witnesses shall be read over to, and signed respectively by, the witnesses who shall be so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions . . . . and afterwards, upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken."

Burden of Proof of Statutory Conditions.—It seems doubtful whether the various requirements of 11 & 12 Vict. c. 42, s. 17, must be affirmatively proved by the party tendering the evidence, or whether, if the signature purports to be that of the justice, and proof is given merely of the death or illness of the deponent, and the presence of, and opportunity of cross-examination by, the accused, the onus is not thrown upon the opposite party to disprove them. The latter view, which seems to accord more with the final words of s. 17, is, it is submitted, the correct one (Steph.

art. 140; and see R. *v.* Peacock, 12 Cox 1, where it was held that proof of the prisoner's presence raised a presumption of full opportunity of cross-examination; *contra*, Ros. Cr. Ev. 56; Powell 546; Tay. s. 482).

These requirements will now be considered in detail:—

(1) *Caption of Deposition—Same Charge.*—A deposition without a caption or title has been held inadmissible (R. *v.* Newton, 1 F. & F. 641; R. *v.* Galvin, Ir. C. C. R. 10 Cox 198, by a majority of five judges to four; *contra*, R. *v.* Langbridge, 3 Cox 465, C. C. R.). But the caption need not state more than that it is the deposition of the witness, and the particular charge preferred before the magistrate (Ros. Cr. Ev. 67; R. *v.* Langbridge, *supra*); and one caption at the head of the whole body of the depositions is sufficient, without a separate caption for each deposition (R. *v.* Johnson, 18 L. J. M. C. 198; R. *v.* Young, 3 C. & K. 106; for the statutory form, see schedule M. to the Act, and Tay. s. 479, note 3).

The charge need not be stated with technical precision (R. *v.* Langbridge, *supra*), but should be the same as that upon which the evidence is afterwards tendered; although if full opportunity of cross-examination was available, a technical difference in the charges will not of itself exclude the evidence. Thus, a deposition taken on a charge of wounding with intent to do grievous bodily harm (R. *v.* Beeston, 24 L. J. M. C. 5); or of stabbing (R. *v.* Dilmore, 6 Cox 52); or of robbery with violence (R. *v.* Lee, 4 F. & F. 63) may be read upon a subsequent trial for the murder of the deponent; and one upon a charge of false pretences has been received upon a subsequent trial for uttering a forged note, when the two arose out of the same transaction, and the same evidence supported both (R. *v.* Williams, 12 Cox 101; *ante*, p. 307).

(2) *Presence of Magistrate.*—The deposition must be taken in the presence of the magistrate; if taken in his absence, they are inadmissible, although afterwards read over and sworn in his presence (R. *v.* Day, 6 Cox 55; R. *v.* Watts, 9 Cox 395; see, however, R. *v.* Bates, 2 F. & F. 317).

Where a prisoner had been charged before, and afterwards committed by, a London magistrate, and the deposition of a sick witness had, in the interval, been taken before and signed by a country magistrate, the deposition was received

[R. *v.* Vidil, 9 Cox 4, *per* Blackburn, J.; this case is doubted by Mr. Taylor, s. 482, note 3; see *infra* (8)].

(3) *Presence of Accused.*—The entire depositions must be taken in the presence of the accused; and the omission of this requisite cannot be cured by reading over and re-swearing them in his presence, for such a method obviously allows a very imperfect opportunity for cross-examination (R. *v.* Day, *supra;* R. *v.* Watts, *supra;* but see R. *v.* Bates, *supra*).

(4) *Oath or Affirmation.*—The deposition must be taken on oath or affirmation; thus, the unsworn testimony of a child taken under the Criminal Law Amendment Act, 1885, s. 4, cannot be read upon proof of the death or illness of the child (R. *v.* Pruntley, 16 Cox 344).

(5) *Opportunity of Cross-examination.*—If a deposition is proved to have been taken in the presence of the accused, the law will presume that he had full opportunity of cross-examination; but this presumption may be rebutted by proof—*e.g.*, that the accused was insane (R. *v.* Peacock, 12 Cox 1); or (perhaps) did not understand the language (see R. *v.* Jones, 49 J. P. 728, *infra*); or that the deponent was so ill as to be unfit for further examination (Tay. s. 486, citing R. *v.* Hyde, 3 Cox 90, decided before the Act). Where both deponent and prisoner only imperfectly understood English, but the prisoner refused the aid of an interpreter, and the magistrate's clerk had advised him that he would only injure his case by further questions, the depositions were received (R. *v.* Jones, *supra*, *per* Manisty, J.).

The magistrate should, when the prisoner is undefended, invite him to cross-examine the witnesses at the end of each examination, and not merely at the end of all the examinations; and should allow him sufficient time to consider his questions (R. *v.* Day, *supra;* R. *v.* Watts, *supra*).

Where the former charge is technically different from the subsequent one, the depositions may still be read if the accused had full opportunity of cross-examination upon all points material to both [*supra* (1)].

(6) *Whole Statement.*—Although in the statutory form the statement of the witness is directed to be taken down "as nearly as possible in the words he uses," and no longer merely "so much thereof as is material," as in the former Act, yet a deposition has been received which included only such portions of the examination as the magistrate considered

material, and omitted altogether the cross-examination (R. *v.* Hendy, 4 Cox 243; and see R. *v.* Bates, 2 F. & F. 317).

(7) *Read over to and signed by Witness.*—The deposition, when completed, is directed to be read over to and signed by the witness; and perhaps upon proof that this formality has been neglected, the evidence will be rejected (Steph. art. 140; Tay. ss. 482, 484; the previous Acts did not contain this provision, see R. *v.* Hemming, 2 Lea. 854).

(8) *Signature of Magistrate.*—The deposition is receivable if it merely "purport to be signed by the justice by or before whom it purports to be taken," unless proof can be given that it was not in fact so signed. It is sufficient if such signature is appended to the end of the whole body of the depositions, provided that the different sheets were fastened together at the time of the signature (R. *v.* Parker, 11 Cox 478; R. *v.* Carrol, *id.* 322). But if the separate sheets were not pinned or otherwise fastened together at or before the time when the last was signed, the unsigned sheets will be rejected (R. *v.* Lee, 4 F. & F. 65; R. *v.* Mann, 49 J. P. 743). It is not necessary that the magistrate by whom the depositions are taken and signed should be the one before whom the prisoner is charged or committed (R. *v.* Vidil, 9 Cox 4; *supra* (2).

(9) *The Witness must be dead, ill, kept out of the way, or insane.*—The admissibility of the depositions is not limited to the two cases mentioned in the statute—"dead, or so ill as not to be able to travel;" if the witness is fraudulently or forcibly kept out of the way by the prisoner himself (R. *v.* Scaife 17 Q. B. 773); or probably if he is insane (R. *v.* Marshall, Car. & M. 147; R. *v.* Scaife, *supra;* Tay. ss. 476, 480; Steph. art. 140, *ante,* p. 307) the depositions will be received; although mere absence in a foreign country is not sufficient (R. *v.* Austen, 25 L. J. M. C. 48). The *degree of illness* is for the judge to determine (R. *v.* Wellings, 3 Q. B. D. 426); and it is advisable, although not essential, to prove it by the medical attendant. Not only ability to travel, but ability to give evidence, must be considered (R. *v.* Cockburn, 7 Cox 265; R. *v.* Wilson, 8 Cox 453; R. *v.* Wilson, 12 Cox 622). The ailment need not be permanent, but where it is temporary the judge may in his discretion postpone the trial for the recovery of the witness (R. *v.* Tait, 2 F. & F. 553; R. *v.* Wilson, 12 Cox 622). The following

degrees of illness have been held *sufficient* to admit the deposition:—Travelling would have endangered life (R. *v.* Day, 6 Cox 55); the deponent had arrived, but returned home, as his doctor testified that it would have been dangerous for him to remain (R. *v.* Wicker, 18 Jur. 252); the deponent could have been brought into court without danger to life, but was disabled by paralysis from giving evidence (R. *v.* Cockburn, *supra*); the deponent could travel, but not complete the object of his journey, as he had a tendency to softening of the brain; and was so ill and nervous that examination and cross-examination would confuse and nullify his evidence, and in his condition be dangerous to life (R. *v.* Wilson, 8 Cox 453). The following have been held *insufficient*:—The deponent had been seized with a bowel complaint on the morning of the trial, and was too ill to travel (R. *v.* Harris, 4 Cox 440; R. *v.* Bull, 12 Cox 31); the deponent was very old, and so nervous that the doctor considered coming into court and being examined would be dangerous to her (R. *v.* Farrell, 12 Cox 605; R. *v.* Thompson, 13 Cox 181); the deponent was in bed two days before the trial, appeared ill, and when he tried to get up could not stand; a non-medical witness believed it to be rheumatics, but no doctor was called (R. *v.* Williams, 4 F. & F. 515); a non-medical witness saw the deponent in bed the night before with cold and inflammation; he was attended by a doctor, and witness heard he was very bad (R. *v.* Ullmer, 4 Cox 442); a non-medical witness saw the deponent in bed, and "was told he had fever" (R. *v.* Welton, 9 Cox 296). The following conditions connected with *pregnancy* have been held *sufficient*:—Deponent's husband stated he did not know how long she had been pregnant, that she could attend to her duties, but a fortnight before had suffered from undergoing a journey (R. *v.* Croucher, 2 F. & F. 285); the deponent was daily expecting her confinement (R. *v.* Stephenson, 31 L. J. M. C. 147; R. *v.* Wellings, 3 Q. B. D. 426; R. *v.* Heeson, 14 Cox 40.; R. *v.* Goodfellow, *id.* 326); the deponent had just been confined of a dead child (R. *v.* Wilton, 1 F. & F. 309). The following have been held *insufficient*:—The deponent expected to be confined in a month (R. *v.* Omant, 6 Cox 466); the deponent had just been confined (R. *v.* Wilton, *supra*; R. *v.* Walker, 1 F. & F. 534; R. *v.* Cotton, 12 Cox 400; *contra*, R. *v.* Harney, 4 Cox

441; in R. *v.* Wilson, 12 Cox 622, "just confined" was considered sufficient to admit the depositions before the grand jury, but the trial was postponed, as the evidence of the witness was most material.

Depositions when admissible on other Grounds.—Depositions, although inadmissible under the statute, may be receivable—(1) To corroborate (see R. *v.* Coll. 24 L. R. I. 522) or contradict (*ante*, pp. 86–88) the deponent when afterwards called as a witness at the trial. In R. *v.* Garner, 54 J. P. 424, where the deponent had admitted that her subsequent testimony differed from her deposition, but neither side had put in the deposition, the judge was held entitled to read it to the jury in his summing-up. The old rules laid down by the judges as to cross-examination upon depositions (noticed Tay. s. 1449, and Ros. Cr. Ev. 62) were superseded by 28 & 29 Vict. c. 18, ss. 4, 5. (2) As dying declarations (R. *v.* Woodcock, 1 East P. C. 356; *ante*, p. 207). (3) To refresh the memory of the official who took them down (Tay. s. 894; R. *v.* Mann, 49 J. P. 743.) (4) They have also been considered admissible under the common law rule (*ante*, p. 305) as testimony given in a former proceeding between the same parties and on the same issue (3 Rus. Cr. p. 519, note *v*); and (5) as statements made in the presence of the prisoner, and not denied by him (R. *v.* Mann, *supra; sed qu.*; the better opinion certainly is that statements made in judicial proceedings are not receivable against a party on this ground; see fully *ante*, pp. 147–151).

(2) **Depositions to perpetuate Testimony.**—Whenever it shall appear to the satisfaction of any justice of the peace that *any person dangerously ill and*, in the opinion of some registered medical practitioner, *not likely to recover from such illness*, is able and willing to give material information relating to any indictable offence, or relating to any person accused of anysuch offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition, in accordance with the provisions of the Act 11 & 12 Vict. c. 42, s. 17 (see *supra* p. 333), of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto, by way of caption, a statement of his reason for taking the same, and of the day

and place when and where the same was taken, and of the persons (if any) present at the taking thereof; and if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same, with the said addition, to the proper officer of the Court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it if needed; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be *dead*, or if it shall be proved that there is *no reasonable probability that such person will ever be able to travel or give evidence*, it shall be lawful to read such statement in evidence either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the Court that reasonable *notice* of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had, or might have had, if he had chosen to be present, a full opportunity of cross-examining the deceased person who made the same (30 & 31 Vict. c. 35, s. 6). A prisoner in actual custody, serving, or served with, such notice, may by order of the committing or visiting justice be brought up in custody to hear the deposition taken (s. 7).

The notice of intention to take such statements must be in *writing;* a mere oral notice, even if the prisoner has actually being present in pursuance of it, will not suffice to admit the deposition (R. *v.* Shurmer, 17 Q. B. D. 323).

(3) **Depositions before Coroners.**—Every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind by recognisance all such persons as know or declare anything material touching the said manslaughter or murder, or the said

offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions at which the trial is to be, then and there to prosecute or give evidence against the party accused; and every such coroner shall certify and subscribe the same evidence, and all such recognisances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court [7 Geo. 4, c. 64, s. 4 (England); 9 Geo. 4, c. 54 (Ireland).]

The conditions of admissibility of such depositions are not satisfactorily settled. Mr. Taylor states (s. 492) that they are rendered admissible as secondary proof by virtue of the statute; Mr. Justice Stephen remarks (art. 142 *n.*) that as the statute says nothing about the conditions on which they may be given in evidence, their admissibility depends on the common law rules regulating testimony taken in former trials (see *ante*, p. 305; though it is difficult to see how the common rules can in strictness apply to such a case).

The statutory requirements differ, it will be observed, from those applicable to magisterial depositions in several respects (see Tay. ss. 493–494). It has been considered that depositions before coroners are receivable although taken in the *absence of the accused;* but the better opinion is against this view (R. *v.* Rigg, 4 F. & F. 1085; and see Tay. s. 494; Ros. Cr. Ev. 72, 73; 3 Rus. Cr. 534.)

The depositions must, it would seem, be proved either by calling the coroner who subscribed them, or by proving his signature, and showing by the clerk or other person present that the statutory forms have been observed (Tay. s. 493).

(4) **Depositions of Witnesses going abroad.**—Depositions are sometimes taken by consent in prosecutions for misdemeanour when the witness is about to leave the country, such depositions being admissible only where the witness is abroad at the time of the trial (Ros. Cr. Ev. 74).

(5) **Depositions taken in India, &c.**—By 13 Geo. 3, c. 63, s. 40, in cases of indictments and informations in the Queen's Bench Division for offences committed in India, that Court may award a mandamus to the judges of the Supreme Courts in India (as to which see now 24 & 25 Vict. c. 104, ss. 10, 11; Wilson *v.* Wilson, 9 P. D. 8) requiring

them to hold a Court for the examination of witnesses and the reception of other proofs concerning the matters in question; and such examination shall be reduced to writing, and returned to the Queen's Bench Division in the manner directed by the Act, and shall be there deemed as good evidence as if the witness had been present. By 6 & 7 Vict. c. 98, s. 4, similar provisions are made with regard to slave-trade offences committed in British colonies.

Depositions as to offences committed abroad by persons employed in the public service are regulated by 42 Geo. 3, c. 85; and those relating to criminal offences in merchant ships by the Merchant Shipping Act, 1854, s. 270; *ante*, pp. 331, 332.

As to the authentication and admissibility of copies of foreign depositions, &c., see 33 & 34 Vict. c. 52, s. 15.

(6) **Examination of the Prisoner.**—The statutory provisions regulating the taking of the prisoner's statement (not on oath) are as follow:—After the examination of all the witnesses on the part of the prosecution as aforesaid (see *ante*, p. 333) shall have been completed, the justice of the peace, or one of the justices, by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read, or cause to be read, to the accused, the depositions taken against him, and shall say to him these words, or words to the like effect:—"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you may say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and be kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may if necessary be given in evidence against him without further proof thereof (the words, "if such deposition purports to be signed by the justice" were probably omitted by accident, 3 Rus. Cr. 502), unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: *Provided* always that the said justice or justices, before such accused

person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favour and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him on his trial, notwithstanding such promise or threat: *Provided*, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statements of the person accused or charged, made at any time, which by law would be admissible as evidence against such person (11 & 12 Vict. c. 42, s. 18; for the Irish Act, see 14 & 15 Vict. c. 93, s. 14, clause 2).

Notwithstanding the minute directions given in the above clause and in the form contained in Schedule N of the Act, it seems that if the statement be headed according to the schedule, it is evidence against the accused on its mere production and without proof of the mode in which it was taken, unless, indeed, it can be shown that the signature of the justice is forged (Tay. ss. 890–892; R. *v.* Sansome, 4 Cox 203). Thus, a statement has been admitted which was not signed either by the justice or the accused (R. *v.* Bond, 4 Cox 231); and it seems that the first caution alone, and perhaps not even that, need be given; although it will certainly be prudent in case any promise or threat may have been previously held out to the accused to give both the statutory cautions (R. *v.* Sansome, *supra*; R. *v.* Bond, *supra*). If the statement is not headed in the prescribed form, or if it contain erasures or interlineations, it will probably be necessary to call the justice or clerk to explain the conditions under which it was taken (Tay. s. 892).

As any statement voluntarily made by the accused is at common law admissible against him, the only advantage conferred by the statute is to simplify the proof of the confession and to render it of more weight. And where the examination is from some informality inadmissible under the statute, or where it has not been reduced to writing, the statement, if voluntarily made or acknowledged by the prisoner, may still be proved as a confession at common law (Tay. s. 894; Ros. Cr. Ev. 57–59; and see *ante*, Confessions).

Moreover, the taking of the statutory examination will not exclude proof of any admission made by the accused before or after the examination (see the last proviso to s. 18, *supra*); or of anything incidentally said by him during it, and before being cautioned (R. *v.* Wilkinson, 8 C. & P. 662; R. *v.* Christopher, 2 C. & K. 994; R. *v.* Harris, 1 Moo. C. C. 343; R. *v.* Bond, *supra;* R. *v.* Stripp, 7 Cox 97); or of statements made by him before the justice on a former investigation, but not incorporated in the examination returned (*id.*)

If, however, the examination was, or purports to have been, *taken upon oath*, it will be wholly inadmissible either as evidence *per se*, or even to refresh the memory of the person taking it, since (1) it would not be voluntary on the part of the prisoner, and (2) it would be *ultra vires* on the part of the magistrate. (Tay. ss. 895–897; Ros. Cr. Ev. 56; *aliter*, as to evidence given by the accused on oath in other proceedings, or respecting the same transaction, but not while a prisoner under examination, *ante*, pp. 157–158.)

Variations and Additions to Depositions, &c.—See on this subject *post*, Chap. XLV.

CHAPTER XLII.

EVIDENCE TAKEN AT THE TRIAL. EXAMINATION, CROSS-EXAMINATION, RE-EXAMINATION.

WITNESSES at the trial of any action, assessment of damages, or criminal charge, must be examined *vivâ voce* and in open court.

There is no jurisdiction, even by consent, to hear cases *in camerâ*, except those affecting lunatics and wards of Court; or where publicity would defeat the object of the action (Andrew *v.* Raeburn, 9 Ch. Ap. 522; Badische *v.* Levinstein, 24 Ch. D. 156; Mellor *v.* Thompson, 31 Ch. D. 56); or where the ecclesiastical practice in this respect continues (Nagle-Gillman *v.* Christopher, 4 Ch. D. 173). [Annual Practice, 1892, p. 626. See, however, Malan *v.* Young, 6 Times L. R. 38.]

EXCLUSION OF UNEXAMINED WITNESSES.—When required in the interests of justice the unexamined witnesses on both sides may (except during the reading of affidavit evidence, Penniman *v.* Hill, 24 W. R. 245) be ordered out of court by the judge, either on his own motion, or at the instance of either party, who, however, cannot demand it as of right (Tay. s. 1400; Selfe *v.* Isaacson, 1 F. & F. 194). When excluded they must not be communicated with as to the proceedings in the case; and those already examined should remain in court till the others have testified (Best s. 636; Streeten *v.* Black, cited *id.*; and see W. N. 1877, p. 297, *mem.* per M. R.); the exclusion may embrace the *parties* to an action (Outram *v.* Outram, W. N. 1877, 75; Usher *v.* Henwood, 26 Sol. Jo. 598; Tay. s. 1400; *contra*, Charnock *v.* Devings, 3 C. & K. 378, is probably not law); the *prosecutor* in a criminal case (R. *v.* Newman, 3 C. & K.

260); the *solicitors* on the record, unless their presence is stated by counsel to be necessary to the proper conduct of the case (Everett *v.* Lowdham, 4 C. & P. 91; Pomeroy *v.* Baddeley, R. & M. 430; R. *v.* Webb, *id.* 431 *n.*); and *experts*, who, however, are generally permitted to remain, at least until the expert evidence is reached (Tay. s. 1400; Ros. Cr. Ev. 128).

If a witness remain in court after being ordered to withdraw, he may be fined and imprisoned for contempt; but his evidence, although open to strong observation, cannot be rejected (Chandley *v.* Horne, 2 M. & R. 423; Cobbett *v.* Hudson, 2 L. J. Q. B. 11; except in Revenue cases, Thomas *v.* David, 7 C. & P. 351).

EXAMINATION IN CHIEF. Object and Scope of.—After the witness has been sworn or affirmed, it is the province of the party by whom he is called to examine him in chief, sometimes called the direct examination, the object of which is to elicit from the witness all the material facts within his knowledge which tend to prove such party's case.

The facts to which the witness may depose are, as we have seen, facts *in issue* or *relevant to the issue* (provided they are not excluded by public policy or privilege), and in certain cases *hearsay*, *opinions*, and *judgments* as to such facts (*ante*, p. 21).

With regard to *documents*, he may, as we shall hereafter see, testify to their existence and identity, but not, in the first instance, to their contents; and may explain, but not in general contradict or vary, their terms (*post*, Chap. xlv.)

A witness called to explain a series of documents produced in court has been allowed, in order to save time, to state their *result*, subject to cross-examination as to particulars (Rowe *v.* Brenton, 3 M. & R. 212). So a witness has been allowed to state what was the general balance of voluminous accounts which were not produced (Roberts *v.* Doxon, Pea. N. P. C. 83; but production must be given if required, Johnson *v.* Kershaw, 1 D. G. & S. 260); or whether a party's books showed his insolvency or the reverse (Meyer *v.* Sefton, 2 Stark. R. 274); or, in what manner bills have invariably been drawn (Spencer *v.* Billing, 3 Camp. 310); he will not, however, be allowed to give his

impressions derived from unproduced documents, for these are matters of inference or construction which belong to the tribunal (Topham *v.* McGregor, 1 C. & K. 320). [See Tay. s. 462; Stark. Ev. 179, 645; Steph. art. 71(h).]

Leading Questions.—Generally a party may not, either in direct or re-examination, elicit the facts of his case by means of leading questions—*i.e.*, questions which suggest the desired answer, or which put disputed matters to the witness in a form permitting of the simple reply of "yes" or "no." Thus, a witness called to prove that A. stole a watch from B.'s shop, must not be asked, "Did you see A. enter B.'s shop and take a watch?" The proper inquiry is, what he saw A. do at the time and place in question.

[Tay, ss. 1404, 1405; Best, ss. 641, 642; Ros. N. P. 164, 165; Ros. Cr. Ev. 131, 132; Powell, 483–487; Steph. art. 128; Whart. ss. 498–504.]

Grounds of Exclusion.—The reasons of the rule are that the witness is presumed to be biassed in favour of the party calling him, who, knowing exactly what the former can prove, might prompt him to give only favourable answers. Such evidence would obviously be open to suspicion, as being rather the pre-arranged version of the party than the spontaneous narrative of the witness (Best, s. 641; Stark. Ev. 166; Powell, 483).

Exceptions.—As the rule is merely intended to prevent the examination from being conducted unfairly, the judge has a discretion (which is not open to review, Lawdon *v.* Lawdon, 5 Ir. L. R. N. S. 27; Rice *v.* Howard, 16 Q. B. D. 681) to relax it whenever he considers it necessary in the interests of justice, and it is always relaxed in the following cases:—

(1) *Introductory and Undisputed Matter.*—To shorten the proceedings and bring the witness as quickly as possible to the material points of the case, it is not only permissible but proper to lead him as to matters which are introductory or not really in dispute.

(2) *Identification.*—So, for the purpose of identifying persons or things, his attention may be directly pointed to them. Thus a witness may be asked if the prisoner in the dock is the person he has referred to (R. *v.* Berenger, 2 Stark. 129; R. *v.* Watson, 32 How. St. Tr. 74). Still, cases might easily be suggested where such an identification would be worth-

less, and where it would be in the highest degree unfair to so prompt the witness (Best, s. 643; Whart. s. 502).

(3) *Assisting Memory.*—A question which merely directs the attention of the witness to a particular topic, without suggesting the answer required, is not objectionable. Thus, to prove a slander imputing that "A. was a bankrupt whose name was in the Bankruptcy List, and would appear in the next Gazette," a witness who had only proved the first two expressions was allowed to be asked, "Was anything said about the Gazette?" (Nicholls *v.* Dowding, 1 Stark. 81). So, where a witness stated that he could not remember the names of the members of a firm so as to repeat them without suggestion, but thought that he might recognise them if read to him, this was allowed to be done (Acerro *v.* Petroni, 1 Stark. 100).

(4) *Contradiction.*—Where one witness is called to contradict another as to expressions used by the latter, the former may be asked not merely what was said, but whether the particular expressions were used, since otherwise a contradiction might never be arrived at (Edmonds *v.* Walter, 3 Stark. 7; Courteen *v.* Touse, 1 Camp. 43). Where, however, the conversation is not proved merely for the purpose of contradiction, the latter question is improper (Hallet *v.* Cousens, 2 M. & R. 238).

(5) *Adverse Witness.*—If a witness by his conduct shows that he is hostile to the party calling him, the latter may, in the discretion of the judge, lead, or rather cross-examine him (Coles *v.* Coles, L. R. 1 P. & M. 70); but the matter is wholly for the Court, and a party, though called by his opponent, cannot as of right be treated as hostile (Price *v.* Manning, 42 Ch. D. 372; C. A., overruling Clarke *v.* Saffery, Ry. & M. 126; see *ante*, p. 87; and *infra*, as to discrediting a party's own witness). As to leading questions in cross-examination see *post*, 356.

Refreshing Memory.—A witness may refresh his memory by reference to any writing made or verified by himself concerning, and contemporaneously with, the facts to which he testifies.

An expert may, as we have seen, refer to professional works, although not written by himself or made contemporaneously (*ante*, p. 263).

Principle.—The reason of the rule has been said to be,

that a witness should not suffer from a mistake, and may explain an inconsistency (Halliday *v.* Holgate, 17 L. T. O. S. 18, *per* Montague Smith, J.)

[Tay, ss. 1405–1413; Ros. N. P. 175–176; Ros. Cr. Ev. 135, 136; Powell, 386–391; Steph. art. 136; Whart. ss. 516–526].

What Documents Admissible.—The writing may have been made either by the witness himself, or by others, providing, in the latter case, that it was read by him when the facts were fresh in his memory, and he knew the statement to be correct (Tay. s. 1410; Steph. art. 136).

Thus, a log-book kept by the mate, and inspected by the captain a week afterwards, is admissible to refresh the memory of either (Anderson *v.* Whalley, 3 C. & K. 54; Borrough *v.* Martin, 2 Camp. 112). So a workman's time-book may be used to refresh the memory of the cashier, who read it every fortnight, when paying the wages in accordance therewith (R. *v.* Langton, 2 Q. B. D. 296). And a newspaper report of proceedings, which was read by the witness when the facts were fresh in his mind, may be similarly used (Dyer *v.* Best, 4 H. & C. 189). So, depositions taken before a magistrate or coroner may be referred to at the trial either by the witness who signed (R. *v.* Williams, 6 Cox 343; Wood *v.* Cooper, 1 C. & K. 645), or by the clerk who wrote them (R. *v.* Mann, 49 J. P. 743; *ante*, p. 339). And a shorthand writer has been allowed to prove a speech from a *partial* note thereof taken by him (R. *v.* O'Connell, Arm. & Tr. 235). On the other hand, a witness will not be allowed to refer to proceedings in a former trial to refresh his memory as to what he stated thereat (Halliday *v.* Holgate, *supra*, see Tichborne case, *ante* p. 117); nor, under the old law, having denied, on cross-examination, the imputation of imprisonment, could a copy of the conviction be produced to refresh his memory (Meagoe *v.* Simmons, 3 C. & P. 75; see now *ante*, p. 88); and some old cases *contra*, in which the witnesses referred to the brief notes of counsel taken at the former trial, seem not to be law (Tay. s. 1410).

As to the admissibility of *copies* of the original writing, the result of the cases seems to be as follows:—(1) Where the copy was made or verified by the witness while the facts were fresh in his recollection, it will be admissible, on the footing of a duplicate or quasi-original, without accounting

for the absence of the strict original. Thus, a sale was allowed to be proved by a clerk who refreshed his memory from a ledger, copied under his supervision from a waste-book kept by himself (Burton *v.* Plummer, 2 A. & E. 341); and a surveyor has been allowed to refer to a printed copy of a written report made by him to his employers, which latter was substantially but not literally transcribed from rough notes taken by him at the trial (Horne *v.* Mackenzie, 6 C. & F. 628). (2) Where the original is in existence, and the witness has no recollection of the facts otherwise than from it, a copy is inadmissible, and the original must be produced (Doe *v.* Perkins, 3 T. R. 749; Tanner *v.* Taylor, *id.*; R. *v.* St. Martin's, 2 A. & E. 210; R. *v.* Harvey, 11 Cox, 546). (3) Where the original has been lost or destroyed, a copy proved to be correct, either by the witness or some third person, may be used. Thus, a journalist has been allowed to refresh his memory by a copy of the paper fourteen years old, although he had no recollection of the facts, proof being given by the editor that the MS. was lost, and that the paper was a copy of it, and by the witness, that he had no doubt the facts stated therein were true (Topham *v.* McGregor, 1 C. & K. 213; Burton *v.* Plummer, *supra*, *per* Patteson, J.; Talbot *v.* Cusack, 17 Ir. C. L. R. 213). In Jones *v.* Stroud, 2 C. & P. 196, discussed in Talbot *v.* Cusack, *supra*, however, the Court rejected a copy made six months after an original which was produced, but was illegible. (4) Where the copy is either not proved to be correct (Alcock *v.* Roy. Ex. Ins. Co. 13 Q. B. 292; Talbot *v.* Cusack, *supra*); or consists of mere imperfect extracts made by the witness (Doe *v.* Perkins, 3 T. R. 749, explained by Patteson, J., in R. *v.* St. Martin's, *supra*), or has been revised and transcribed with the help of the solicitor to the case (Anon. cited by Lord Kenyon in Doe *v.* Perkins, *supra*), it cannot be used to refresh memory, whether the original is in existence or not.

The document need not be admissible in evidence *per se*. Thus, an invalid lease (Bolton *v.* Tomlin, 5 A. & E. 856); or an irregular deposition (R. *v.* Mann, 49 J. P. 743; but *quære* now, an unstamped document, Stamp Act, 1891, s. 14), may be referred to; and user for this purpose does not make it evidence in the case (Alcock *v.* Roy. Ex. Ins. Co., *supra*; Payne *v.* Ibbotson, 27 L. J. Ex.

341). If the witness has become *blind*, the paper may be read over to him (Catt *v.* Howard, 3 Stark. R. 3; Vaughan *v.* Martin, 1 Esp. 440).

Independent Recollection.—It is not essential that the witness should have any independent recollection of the facts. Thus, an attesting witness, from seeing his own signature to a deed, may say he is sure that the party has executed it (Maugham *v.* Hubbard, 8 B. & C. 14); so, a barrister may refer to notes on his brief, though he has no recollection of the case (R. *v.* Guinea, Ir. Cir. R. 167); or an agent who has made a memorandum of the terms of a lease but forgotten the transaction, may swear from seeing the memorandum that he has no doubt the lease was granted (R. *v.* St. Martin's, 2 A. & E. 210; Ray. s. 1412). So, as we have seen, a journalist may refer to the copy of an article written by him, though he has forgotten the facts narrated (Topham *v.* McGregor, *supra*).

Contemporaneousness.—The document must have been written either at the time of the transaction, or so shortly afterwards that the facts were probably fresh in his memory (Burrough *v.* Martin, 2 Camp. 112; Whitfield *v.* Aland, 2 C. & K. 1015; Talbot *v.* Cusack, *supra*). A delay of a fortnight will not be fatal (R. *v.* Langton, 2 Q. B. D. 296); but an interval of several weeks (R. *v.* Gordon Kinlock, 25 How. St. Tr. 934–937), or six months (Jones *v.* Stroud, 2 C. & P. 196; Whitfield *v.* Aland, *supra;* Steinkeller *v.* Newton, 9 C. & P. 315), has been held to exclude.

Production. Cross-examination.—Where the witness has no independent recollection of the facts, the document used to refresh his memory *must* be produced (Howard *v.* Canfield, 5 Dowl. 417; Beech *v.* Jones, 5 C. B. 696); and even where he has such recollection this course *should* be adopted, in order that the opponent may have the benefit of cross-examination and of the witness refreshing his memory by every part (*id.*; Tay. s. 1413). If produced, the opponent has a right to inspect and cross-examine. But cross-examination on the portions referred to by the witness does not make the document evidence against the cross-examiner (Gregory *v.* Tavernor, 6 C. & P. 218; Payne *v.* Ibbotson, 27 L. J. Ex. 341), though it is otherwise with cross-examination upon independent parts (Gregory *v.* Tavernor, *supra*). And if the questions founded upon the document fail, or if

it is merely used to prove the handwriting, the opposite party is not entitled to see it (R. *v.* Duncombe, 8 C. & P. 369; Tay. s. 1413); and if he does he may be required to put it in evidence (Palmer *v.* Maclear, 1 S. & T. 149).

Discrediting Party's own Witness.—Since the fact of calling a witness is supposed to represent him to the Court as worthy of credit, it has been provided that a "party producing a witness shall not be allowed to impeach his credit by general evidence of bad character (*ante*, pp. 87–88); but he may, in case the witness shall in the opinion of the judge prove *adverse*, contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." [17 & 18 Vict. c. 125, s. 22 (Civil Cases); 28 & 29 Vict. c. 18, ss. 1–3 (Criminal Cases)].

When the Witness is Adverse.—A witness is considered adverse when in the opinion of the judge he bears a hostile feeling to the party calling him, and not merely when his testimony contradicts his proof (Greenough *v.* Eccles, 5 C. B. N. S. 786; Reed *v.* King, 30 L. T. 290; Tay. s. 1426; Steph. art. 131; *contra*, Dear *v.* Knight, 1 F. & F. 433, *per* Erle, J.; Pound *v.* Wilson, 4 F. & F. 301; Anstell *v.* Alexander, 16 L. T. 830, *per* Bramwell, B., in which cases the latter view was adopted; see also R. *v.* Little, 15 Cox 319. In Coles *v.* Coles, L. R. 1 P. & M. 71, Wilde, J. O., remarked: "A hostile witness is one who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the Court." This definition, however, might in many cases apply to a favourable witness.) It is now settled that a party when called by his opponent cannot as of right be treated as hostile, the matter being solely in the discretion of the Court (Price *v.* Manning, 42 Ch. D. (C. A.) 372); since which decision also it would seem that the older cases (*see* Bowman *v.* Bowman, 2 M. & R. 501; Jackson *v.* Thomason, 1 B. & S. 745; Coles *v.* Coles, *supra*) holding that a necessary witness—*i.e.*, one whom a party is compelled to call, and who may therefore be considered rather the witness of the Court than of the party, as an attesting

witness to a will, can be discredited by his own side, are no longer law.

The opinion of the judge as to whether a witness is adverse is final and not the subject of appeal (Rice *v.* Howard, 16 Q. B. D. 681).

When the Witness is not Adverse.—Although by the above statutes both the opinion of the judge that the witness is adverse, and his previous leave, are conditions precedent to the proof of contradictory *statements* by the witness; yet in spite of these statutes, a party may, as of right, without obtaining such opinion or leave, contradict his own witness by *other evidence* relevant to the issue, and thus indirectly discredit him. Mr. Justice Stephen remarks that the words,—"'he may in case the witness shall, in the opinion of the judge prove adverse, contradict him by other evidence,'—suggest that he cannot do so unless the judge is of that opinion. This is not, and never was, the law" (Dig. Ev. note xlvii.; and see Greenough *v.* Eccles, *supra;* Ros. N. P. 173, 174).

[Tay. ss. 1426–1427; Ros. N. P. 173–174; Ros. Cr. Ev. 97–98; Powell, 487–489; Steph. art. 131; Whart. s. 549].

CROSS-EXAMINATION.—Liability to.—When a witness has been intentionally called and sworn by either party, the opposite party has a right, if the examination in chief is waived (R. *v.* Brooke, 2 Stark. R. 472; Phillips *v.* Eames, 1 Esp. 357); or if the counsel changes his mind and asks no questions (L. T. March 15, 1890, *per* Stephen, J.); or if the examination is closed, to cross-examine him. So a deponent, whether party or stranger, who has filed an affidavit for the purpose of being used in Court, is liable to cross-examination thereon, even though the affidavit has been withdrawn (*Re* Quartz Hill Co. *Ex parte* Young, 21 Ch. D. 64).

In criminal cases, although the prosecution is not in strictness bound to call every witness named on the back of the indictment, it is usual to do so in order to afford the prisoner's counsel an opportunity to cross-examine them; and if the prosecution will not call them, the judge in his discretion may (R. *v.* Simmonds, 1 C. & P. 84; R. *v.* Bull, 9 C. & P. 22). So, on charges of homicide, and perhaps in

other serious cases, witnesses, even though not so named, but who were present at the transaction, are sometimes called by the judge for the furtherance of justice (*Id.* R. *v.* Holden, 8 C. & P. 609; R. *v.* Stroner, 1 C. & K. 650; R. *v.* Chapman, 8 C. & P. 558; R. *v.* Orchard, *id.* note). If this has been done at the instance of the prisoner, and no question is put to them by the prosecution, they become so far the prisoner's witnesses, that, though he may cross-examine, he cannot contradict them (R. *v.* Bodle, 6 C. & P. 186); and the prosecution can only re-examine as to matters arising out of the cross-examination (R. *v.* Beezley, 4 C. & P. 220) and perhaps, if there has been a refusal to call the witness, not even then (R. *v.* Harris, 7 C. & P. 581).

When several prisoners are tried on the same indictment and separately defended, any witness called by one may be cross-examined by the others against whom they have given criminatory evidence; and the parties against whom such evidence is given have a right to reply thereon (R. *v.* Burditt, 6 Cox 458). The same rule has also been applied to co-defendants in equity (Lord *v.* Colvin, 3 Drew. 222).

Exemptions.—The following witnesses are exempt from cross-examination:—(1) *A witness called merely to produce a document* under a *subpœna duces tecum*, need not be sworn if the document either requires no proof, or is to be proved by other means; and if not sworn he cannot be cross-examined (Summers *v.* Moseley, 2 C. M. & R. 477; Perry *v.* Gibson, 1 A. & E. 48). (2) *A witness sworn by mistake* either of the counsel or officer of the Court, and whose examination has not substantially begun, is not liable to cross-examination (Wood *v.* Mackinson, 2 M. & R. 273; Clifford *v.* Hunter, 3 C. & P. 16; Rush *v.* Smith, 1 C. M. & R. 94; Reed *v.* James, 1 Stark. 132). But where the witness can speak to the transaction, but the counsel calling him changes his mind, and after the witness is sworn, asks no questions, the right to cross-examine remains (L. T. March 15, 1890, *per* Stephen, J.). (3) *A witness whose examination has been stopped by the judge* before any material question has been put, is not liable to cross-examination (Creevy *v.* Carr, 7 C. & P. 64). It may be added that witnesses to character though in strictness liable to be, are in practice very rarely, cross-examined (*ante*, p. 82).

Party's witness re-called by Opponent.—Whether the right to cross-examine survives if the cross-examiner afterwards calls his opponent's witness to prove his own case, seems doubtful; but the better opinion is that it does not; and that the witness cannot be asked leading questions on his second examination, while he may afterwards be cross-examined by the party who originally called him (Malone *v.* Spillessy, Ir. Cir. Rep. 504; Lord *v.* Colvin, 3 Drew. 222; *contra*, Dickinson *v.* Shee, 4 Esp. 67, is doubted in Tay. s. 1433).

Death, &c., before Cross-examination.—Where the witness dies, or falls ill before cross-examination, his evidence will be admissible though its weight may be slight (R. *v.* Doolin, Jebb. C. C. 123). So, the affidavit of a witness who could not be produced for cross-examination by reason of death (Abadom *v.* Abadom, 24 Beav. 243; Morley *v.* Morley, 5 De G. M. & G. 610; Davies *v.* Otty, 13 W. R. 484; Elias *v.* Griffith, 46 L. J. Ch. 806; Tanswell *v.* Scurrah, 11 L. T. 761), insanity (Ridley *v.* Ridley, 34 Beav. 329), or paralysis (Braithwaite *v.* Kearns, 34 Beav. 202), has been received. But absence from the country (Bingley *v.* Marshall, 6 L. T. 682; Dunne *v.* English L. R., 18 Eq. 524), or temporary illness (Nason *v.* Clamp, 12 W. R. 973), has been held insufficient; the proper course being to adjourn the trial or issue a commission. So, the Court has refused to act on the affidavit of a witness who had absconded before cross-examination (Shea *v.* Green, 2 Times L. R. 533). [Compare *ante*, pp. 307, 329, 336.]

Object and Scope of.—The object of cross-examination is twofold,—to weaken, qualify, or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses. With this view the witness may be asked not only as to facts in issue, or directly relevant thereto, but all questions (1) tending to test his means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment; or (2) tending to expose the errors, omissions, contradictions, and improbabilities in his testimony; or (3) tending to impeach his credit by attacking his character, antecedents, associations, and mode of life; and in particular by eliciting (*a*) that he has made previous statements inconsistent with his present testimony; or (*b*) that he is

biassed or partial in relation to the parties to the cause; or (*c*) that he has been convicted of any criminal offence (*ante*, pp. 86–90).

Leading Questions.—Assumptions contrary to Fact.—Though perhaps leading questions may in strictness be put in cross-examination, whether the witness be favourable to the cross-examiner or not (Parkin *v.* Moon, 7 C. & P. 409, per Alderson, B.); yet where a vehement desire is betrayed to serve the interrogator, it is certainly improper, and greatly lessens the value of the evidence, to put the very words into the mouth of the witness which he is expected to echo back (R. *v.* Hardy, 24 How. St. Tr. 659, 755; Tay. s. 1431).

So, counsel have no right to mislead a witness by assuming that facts have been proved, and particular answers given, when such assumptions are contrary to the fact (see Hill *v.* Coombe, and Handley *v.* Ward, cited 1 St. Ev. 188, note *n*).

Compulsion to Answer.—Contradiction.—A witness, as we have already seen (*ante*, p. 90), is not always compelled to answer questions put to him in cross-examination; and though he may be contradicted on all matters directly relevant to the issue, he cannot, except in the cases (*a*), (*b*), and (*c*), *supra*, be so contradicted on matters relevant merely as affecting his credit.

Modes of Impeaching Credit.—The credit of any adversary's witness may be impeached in the following ways:—(1) By cross-examination; (2) by calling witnesses to disprove his testimony on material points; (3) by eliciting, or, if denied, independently proving, previous contradictory statements; bias or partiality; or conviction of crime; (4) by independent proof that he bears such a reputation for untruthfulness as to be unworthy of belief (see *ante*, pp. 86–90).

Re-establishing Credit.—Recrimination.—Where a witness's reputation for veracity has been attacked, his credit may be restored in the manner described *ante*, pp. 90–91; and the impeaching witnesses may also themselves be discredited (p. 91).

[Tay. ss. 1428–1473; Ros. N. P. 176–183; Ros. Cr. Ev. 132–134; Powell, 489–499; Steph. arts. 126–134; Whart. ss. 527–571.]

RE-EXAMINATION.—The re-examination must be confined to the explanation of matters arising in cross-examination (the Queen's case, 2 B. & B. 297; R. *v.* St. George, 9 C. & P. 488; Tay. ss. 1494–1495; Ros. N. P. 183; Ros. Cr. Ev. 134, 135).

Thus, if the witness has admitted having made a former inconsistent statement, he may in re-examination explain his motives for so doing (R. *v.* Woods, 1 Cr. & D. 439; Queen's case, *supra*). Even if inadmissible matters are introduced, the right to re-examine upon them remains (Blewett *v.* Tregunning, 3 A. & E. 554).

But matters not properly explanatory, or new facts, cannot be introduced in this way. Thus, where a certain conversation had been admitted in cross-examination, distinct matters occurring in the same conversation were not allowed to be proved in re-examination (Prince *v.* Samo, 7 A. & E. 627, cited *ante*, p. 128). As to whether cross-examination upon an omission in a sworn information will let in another information on the same subject in which the omission was rectified, see R. *v.* Coll, 24 L. R. I. 522; *ante*, p. 86).

New facts may, however, by leave of the judge, who usually puts the questions himself, be elicited in re-examination; and the opponent may then cross-examine upon them.

EXAMINATION BY JUDGE.—RE-CALLING WITNESS.—Not only may the judge, as we have seen, call witnesses whom the prosecution has refused to put into the box (*ante*, p. 353), but he may in all cases put such questions to a witness as the interests of justice require (R. *v.* Remnant, R. & R. 136; R. *v.* Watson, 6 C. & P. 653; Ros. Cr. Ev. 130).

So, he may at any stage of the trial, either at his own instance or that of a party, recall a witness for further examination or cross-examination; though, after a party's case is closed, this will only be allowed under special circumstances (Tay. s. 1477; Ros. Cr. Ev. 129).

NUMBER OF WITNESSES.—CORROBORATION.—In trials for *high treason*, or misprision of treason (other than compassing the Sovereign's death) two witnesses are essential, either both to the same overt act, or one to one, and

another to another overt act of the same treason (Tay. ss. 952–958; Steph. art. 122).

In trials for *perjury* the defendant cannot be convicted unless the oath of the opposing witness is corroborated by proof of some material and independent circumstance (Tay. ss. 959–963). So, in cases of *breach of promise* (32 & 33 Vict. c. 68, s. 2; see Wiedemann *v.* Walpole, 1891, 2 Q. B. 534, *ante*, p. 151), and *bastardy* (8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 6, s. 4; Tay. s. 964; Cole *v.* Manning, 2 Q. B. D. 611), the testimony of the plaintiff or mother must be corroborated in some material particular. And the same rule applies to *orders of removal* (39 & 40 Vict. c. 61, s. 34; R. *v.* Abergavenny Union, 6 Q. B. D. 31); and to offences under the *Criminal Law Amendment Act*, 1885, s. 4, and the *Prevention of Cruelty to Children Act*, 1889, s. 8, where the proof of such offences rests on the unsworn testimony of children.

It is also a rule of practice, though not of strict law, that Courts will not act upon the uncorroborated testimony of *claimants to the property of deceased persons* (Finch *v.* Finch, 23 Ch. D. 267; Livesy *v.* Smith, 15 Ch. D. 655; *In re* Garnett, 31 Ch. D. 1; *In re* Hodgson, 31 Ch. D. 183); nor, in criminal cases, upon the unsupported evidence of an *accomplice*. As to the nature and extent of the corroboration required in the latter case, it is now settled (1) that there must be corroboration both as to the circumstances of the crime and the identity of the prisoner (R. *v.* Farlar, 8 C. & P. 106; R. *v.* Stubbs, 25 L. J. M. C. 16); (2) that where there are several prisoners there must be corroboration as to all, and the jury should be advised to acquit those against whom there is none (R. *v.* Stubbs, *supra*); (3) that the accomplice must be corroborated by independent evidence; it is not sufficient if he is confirmed merely by his own wife (R. *v.* Neale, 7 C. & P. 168; R. *v.* Jellyman, 8 C. & P. 604), or by another accomplice (R. *v.* Noakes, 5 C. & P. 326; R. *v.* Magill, Ir. Cir. R. 418). [Tay. ss. 967–971; Ros. Cr. Ev. 122–127.]

BOOK II.

ADMISSIBILITY OF EVIDENCE.

PART III.—DOCUMENTS.

CHAPTER XLIII.

PROOF OF DOCUMENTS. PRIMARY EVIDENCE. EXECUTION AND ATTESTATION. SECONDARY EVIDENCE.

THE contents of all documents must, when possible, be proved by primary evidence; but when the production of such evidence is out of a party's power, secondary evidence thereof may be given (*post*, p. 376).

The term *Primary Evidence* as ordinarily used means original evidence, the best or highest kind, that which the law regards as affording the greatest certainty of the fact in question. *Secondary evidence* means derivative or substitutionary evidence, that which itself indicates the existence of more original sources of information [Tay. s. 395; Best, ss. 89, 472].

The distinction refers only to the quality and not to the strength of the proof; and the above definitions can, as will be seen, only be taken as approximately correct.

PRIMARY EVIDENCE.—Primary evidence of the contents of a document may be given in the following forms:—

(1) **The Production of the Original Document.**—Unless the document is a public one, admissible on its mere production (*ante*, p. 9; *post*, chap. xliv.), it must be identified on

oath as being what it purports to be, and in certain cases proof of its due execution and attestation must also be given.

Where there are *duplicate originals*—*i.e.*, two documents both fully executed by each party—both are considered primary evidence; in the case of *counterparts*—*i.e.*, where each document is fully executed by one party only—they are primary evidence against the executing party and his privies, but secondary evidence only against the non-executing party or his privies, except in proof of ancient possession (Tay. s. 427; *ante*, p. 51). Where there are discrepancies between a lease and its counterpart, the former will in the absence of evidence be presumed correct (Burchell *v.* Clark, 2 C. P. D. 88); while with respect to the stamp, the counterpart sealed by the lessor or grantor is deemed the original (Tay. s. 426; see Stamp Act 1891, s. 72). Where a number of documents are made by a uniform process, as printing, lithography, or photography, each is primary evidence of the contents of the rest (R. *v.* Watson, 2 Stark. R. 129); but only secondary evidence of the common original (Noden *v.* Murray, 3 Camp. 224) [Steph. art. 64].

(2) **Admissions.**—Oral or written admissions of the contents of a document are primary evidence thereof against a party, without notice to produce, or accounting for the absence of the original, since such proof is not open to the same objections as is parol evidence from other sources (Slatterie *v.* Pooley, 6 M. & W. 664; *ante*, p. 125). So if a *copy* of a document be delivered by a party (Stowe *v.* Querner, L. R. 5 Ex. 155, 159) or knowingly used by him as true in a previous trial (*ante*, pp. 143, 149). And the same rule holds where the admission has been made by a party's predecessor in title, or others in privity with him [Price *v.* Woodhouse, 3 Ex. 616, where a copy of a document which had been *dealt with* by such predecessor was held to be primary evidence against the successor, though another copy which was merely found *deposited among his papers* was only received as secondary evidence after proof of the existence and loss of the original. So the memorial of a deed executed by a party's predecessor is primary evidence against the former (Riggs-Miller *v.* Wheatley, 28 L. R. I. 144)].

(3) **Copies made under Public Authority.**—In a few cases copies of an original document made under public authority are receivable as primary evidence thereof. Thus, probate

of a will of personalty, is primary evidence of the will, the original will not being even admissible, though it may be looked at for purposes of construction (Pinney *v.* Hunt, 6 Ch. D. 98; Turner *v.* Hellard, 30 Ch. D. 390); so the Act Book, or register, containing an entry of the probate, or even a certified or examined copy of either, is primary evidence, and receivable without accounting for the non-production of the probate (Cox *v.* Allingham, Jacob, 514; Dorrett *v.* Meux, 15 C. B. 142; 14 & 15 Vict. c. 99, s. 14). Where, however, proof is required of the declaration of a deceased person contained in a will, the will itself is primary evidence and the probate secondary only (*ante*, p. 198).

Copies of public registers made under the authority of statute or common law are themselves sometimes regarded as original documents, and are provable by copies (*ante*, p. 219); and the same view has been taken of a copy, similarly made, of an ancient statutory survey (Poole *v.* Griffith, 15 Ir. L. R. N. S. 230, 280; *ante*, p. 234).

[Tay. ss. 391–427; Best, ss. 472–481; Ros. N. P. 1–4; Powell, 63–69; Steph. art. 64.]

EXECUTION.—After a document has been produced it frequently becomes necessary to prove the handwriting, signature, or execution thereof.

Handwriting and Signature.—The handwriting and signature of unattested documents may be proved by calling (1) *the writer;* or (2) a witness who *saw the document signed;* or (3) a witness who has acquired a *knowledge of the writing* in any of the three ways mentioned *ante*, p. 269; or by (4) *comparison* of the document in dispute with any other proved to the satisfaction of the judge to be genuine (*ante*, pp. 48–49); or by (5) the *admissions* of the party against whom the document is tendered, whether such admissions are of an evidentiary nature (*ante*, p. 125), or made for the purposes of the trial only (*ante*, p. 6).

The above methods being equally admissible and equally primary (Tay. s. 1862; *ante*, pp. 12, 269–270), may be resorted to indifferently; subject, of course, to observation should weaker proof be tendered where stronger might have been adduced.

Sealing and Delivery.—Signature, though usual, is not necessary to the validity of a deed, unless under a power

requiring it, and forms no part of the execution. Nor is an unsigned indenture of lease for more than 3 years void under the Statute of Frauds (Tay. s. 1001; Ros. N. P. 137).

But where the signature of a deed has been proved, and the attestation clause is in the usual form, sealing and delivery may be presumed (Tay. s. 149; Ros. N. P. 135; though "delivery" is not mentioned in the clause, Hall *v.* Bainbridge, 12 Q. B. 699.) So, if signature and sealing are proved, delivery will be presumed (*id.*). And where a party had acted under a deed which was merely sealed, but not signed nor attested, its due execution was presumed against him (Cherry *v.* Heming, 4 Ex. 631).

To constitute *sealing*, neither wax, nor wafer, nor a piece of paper, nor even an impression is necessary (*Re* Sandilands, L. R. 6 C. P. 411); but there must be circumstances from which sealing may, in fact, be inferred (Nat. Prov. Bank of England *v.* Jackson, 33 Ch. D. 1). Where the seal of a corporation is not judicially noticed (as to which see *ante*, p. 9), it may be proved by any one who knows it, without calling a witness who saw it affixed (Moises *v.* Thornton, 8 T. R. 307).

So, no particular form of *delivery* is necessary. Thus, a party throwing it on the table with intent that the other should take it up (Com. Dig. Fait. A. 3); or treating it as his own (Ball *v.* Dunsterville, 4 T. R. 313); or adopting the signature of another who has signed for him (Tupper *v.* Foulkes, 30 L. J. C. P. 214) is sufficient. And fixing the common seal of a corporation is tantamount to delivery, unless an opposite intent can be gathered (Mowatt *v.* Castle Steel Co., 34 Ch. D. 58; see Staple &c. *v.* Bank of England, 21 Q. B. D. 165). As to the conditional delivery of a deed as an escrow, see Ros. N. P. 137; and *post*, Chap. xlv. As to the execution of instruments under *powers of attorney*, see Conveyancing Acts, 1881, ss. 44, 48, and 1882, ss. 8, 9; Young *v.* Schuler, 11 Q. B. D. 651; Ros. N. P. 136. And as to execution under *order of Court*, see Jud. Act, 1884, s. 14; Howarth *v.* Howarth, 11 P. D. 95; Ros. N. P. 136; and Annual Practice, note to this section.

Documents requiring Attestation.—When a document is required by law to be attested, it must (subject to the exceptions mentioned below) be proved by calling the attesting witness. Where there are several of such witnesses, one

only need be called, except in the case of wills of realty (*post*, chap. xliv.; Tay. s. 1854; Ros. N. P. 146). Where the execution has already been proved in a former trial between the same parties, by an attesting witness since deceased, his deposition is primary evidence, and dispenses with calling the survivor (Wright *v.* Doe *d.* Tatham, 1 A. & E. 3); but the absence of all the witnesses must be accounted for before secondary evidence of execution will be admitted.

Unless otherwise provided, it is not necessary that the witness should have actually seen the party sign or seal; it is sufficient if the latter acknowledged an impression already made; or if he delivered the document already signed and sealed, or sealed alone, where signature is not necessary (Ros. N. P. 133–134).

Who may be attesting Witnesses.—A party to a *deed* is not a competent witness to attest it (Seal *v.* Claridge, 7 Q. B. D. 517); and although executors and beneficiaries under a *will* are competent, yet neither they nor their husbands or wives can take any benefit under the will (Wills Act, 1837, ss. 15, 17). This forfeiture, however, does not apply to creditors (s. 16); nor to a trustee taking merely the legal estate.

The signatures of the directors and secretary of a company witnessing the affixing of the common seal form part of the execution, and such persons are not considered as attesting witnesses (Deffell *v.* White, L. R. 2 C. P. 144; and see Doe *v.* Chambers, 4 A. & E. 410; and Dunn *v.* Dunn, L. R. 1 P. & M. 277; Ros. N. P. 132–133).

Where attested Document lost, &c.—The rule requiring the production of the attesting witnesses, provided their names are known, holds, although the document is lost or destroyed (Keeling *v.* Ball, Peake, Add. Cas. 88; Gillies *v.* Smithers, 2 Stark. R. 528); or cancelled (Breton *v.* Cope, Peake R. 44); or the witness is blind (Cronk *v.* Frith, 9 C. & P. 197); or the person executing the document has admitted the execution (Tay. s. 1843; as to such admissions by a party to the cause see *infra*, p. 365).

Where attesting Witness incapable of being called.—When the witness is dead, insane, out of the jurisdiction, kept away in collusion with the other side, or cannot be found after diligent search,—secondary evidence of execu-

tion by proof of the *handwriting* of the witness must be given; or, if this is not obtainable, by other circumstantial or presumptive evidence (Clarke *v.* Clarke, 5 L. R. I. 47; Flood *v.* Russell, 29 L. R. I. 91. See *ante*, p. 209).

So, perhaps, if the witness is seriously ill (Jones *v.* Brewer, 4 Taunt. 46; *contra*, Harrison *v.* Blades, 3 Camp. 457, where the proper course was said to be either to apply to examine the witness out of court, or to postpone the trial; Tay. s. 1843; Ros. N. P. 132). If the witness is dead and the document lost, proof of his handwriting is not perhaps strictly necessary, at least where he can be otherwise identified (R. *v.* St. Giles, 1 E. & B. 642). As to the case of a lost will the attesting witnesses to which are dead, see Harris *v.* Knight, 15 P. D. 170.

Where attesting Witness forgets or denies Execution.—Where the witness has no recollection of the execution, but from seeing his signature has no doubt that it took place, this is sufficient proof (Ros. N. P. 134; and see as to wills, Wright *v.* Saunderson, 9 P. D. 149; Paton *v.* Omerod, C. A. Times, Feb. 3, 1892). But where he denies the execution (Talbot *v.* Hodson, 7 Taunt. 251; Bowman *v.* Hodgson, L. R. 1 P. & M. 362; Wright *v.* Rogers, *id.* 678); or has signed without the knowledge or consent of the parties (McCraw *v.* Gentry, 3 Camp. 232); or, where a fictitious name is used (Fosset *v.* Brown, Pea. 23); or the instrument is lost, and the names of the witnesses are unknown (Keeling *v.* Ball, *supra*); the case is the same as if there were no attesting witness, and the execution may be proved by any other evidence obtainable.

Identity of Party Executing.—Whether the execution is proved by the attesting witness or by secondary evidence, proof may of course have to be given of the identity of the defendant with the person executing the document—*e.g.*, by showing that the signature is his, or that he has spoken of the contents of the deed (Doe *v.* Paul, 3 C. & P. 613)—or by proof of similarity of name, residence, and occupation, or even of name alone (Tay. ss. 1856–1861; Ros. N. P. 134).

Where attesting Witness need not be called.—In the following cases proof of the execution of documents required by law to be attested is dispensed with, although the subscribing witness may be alive and in Court ready to be called:—(1) When the document is *thirty years old*, com-

puted from the date of execution (see *post*, p. 369). (2) When the document is in the *possession of the adverse party*, who refuses to produce it pursuant to notice (Cooke *v.* Tanswell, 8 Taunt. 450; Poole *v.* Warren, 8 A. & E. 588). (3) When the adverse party producing a deed pursuant to notice, *claims some subsisting interest* under it in the subject-matter of the cause (Doe *v.* Marquis of Cleveland, 9 B. & C. 864, 869; Rearden *v.* Minter, 5 M. & G. 204; Collins *v.* Bayntun, 1 Q. B. 117), for by claiming an interest he admits its validity (Pearce *v.* Hooper, 3 Taunt. 60). [Tay. s. 1848; Ros. N. P. 141.] (4) When the execution has been *admitted for the purposes of the trial* (Whyman *v.* Garth, 8 Ex. 803; Tay. s. 1850; as to such admissions, which will not in all cases dispense with formal proof, see *ante*, p. 6); or when the adverse party is *estopped from disputing it by recital* (Bringloe *v.* Godson, 5 Bing. N. C. 738; Nagle *v.* Shea, Ir. R. 9 C. L. 389; Nash *v.* Turner, 1 Ex. 217; Tay. s. 1849; Ros. N. P. 76, 142; *contra*, Doe *v.* Penfold, 8 C. & P. 536); or when he has *executed a new agreement incorporating the old*, in which case execution of the new alone need be proved (Fishmongers' Co. *v.* Dimsdale, 6 C. B. 896; 12 C. B. 557). Where the admissions, however, do not amount to an estoppel, or to an express or implied waiver of proof for the purposes of the trial, they will not dispense with calling the attesting witness. Thus, if the party in his pleading denies the execution, his admission thereof on oath in a former trial will not be receivable (Call *v.* Dunning, 4 East 53; Whyman *v.* Garth, *supra;* Bowles *v.* Langworthy, 5 T. R. 366, *contra*, is probably not law); nor can he be compelled, or even allowed, to be called by his opponent to admit the execution in the witness-box (Whyman *v.* Garth, *supra*). (5) When the person against whom the document is tendered is a *public officer bound by law to procure the execution*, and who has dealt with it as duly executed (Plummer *v.* Briscoe, 11 Q. B. 46, the case of a replevin bond assigned by the sheriff; Tay. s. 1850).

It is perhaps doubtful whether the attesting witness need be called in the case of deeds executed by corporations, or enrolled under statute (tendered against persons other than those on whose acknowledgment they have been enrolled); but the better opinion, at least in the former case,

is in favour of requiring such proof (Tay. ss. 1852–1853; Steph. art. 67, *note* 3; Ros. N. P. 130).

Documents not requiring Attestation.—An attested document, to the validity of which attestation is not by law necessary, may be proved by admission or otherwise, as if there were no attesting witnesses [17 & 18 Vict. c. 125, s. 26 (civil cases); 28 & 29 Vict. c. 18, ss. 1, 7 (criminal cases)].

This rule has been held to apply only where all the parties are before the Court; in proceedings *Ex parte*, the attesting witness must still be called (*Re* Reay, 3 W. R. 312; *Re* Rice, 32 Ch. D. 35; Worthington *v.* Moore, 64 L. T. 338).

Alterations.—Blanks.—*Deeds and Contracts.*—Any material alteration—*i.e.*, one which affects the liability of either party as expressed in the instrument (Aldous *v.* Cornwall, L. R. 3 Q. B. 573)—made in a deed or contract after its execution, and while in the control of the party enforcing it (even though made by a stranger without his knowledge or consent, Davidson *v.* Cooper, 13 M. & W. 343), renders the instrument void, unless such alteration was made with the privity of the party charged. [Tay. ss. 1819–1838; Ros. N. P. 631–633; Steph. art. 89.] But a material alteration made by a stranger while the instrument was not in the custody or control of the party enforcing it (Hutchins *v.* Scott, 2 M. & W. 814; Lowe *v.* Fox, 12 App. Cas. 217, per Lord Herschell); or a material alteration by whomsoever made when the instrument is tendered not for the purpose of enforcing it, but of proving a collateral fact (Hutchins *v.* Scott, *supra;* Agricultural Cattle Insurance Co. *v.* Fitzgerald, 16 Q. B. 432; Ward *v.* Lumley, 20 L. J. Ex. 322); or an immaterial alteration, provided it be not fraudulently made (Tay. s. 1830) will not avoid the instrument. It must be remembered, however, that under the Stamp Laws an alteration even by consent of both parties may render the instrument invalid. A document which is merely in a mutilated or imperfect state is not deemed to be altered in the above sense; and will be admissible, though its value as evidence may be affected (Tay. s. 1838).

Bills and Notes.—By the Bills of Exchange Act, 1882, s. 64 (1) where a bill or acceptance is materially altered without the assent of all the parties liable thereon, it is avoided

except as against a party who has himself made, authorised or assented to the alteration, and subsequent indorsees. Provided that, where a bill has been materially altered, but the alteration is not apparent (Leeds Bank *v.* Walker, 11 Q. B. D. 84) and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour. (2) In particular, the following alterations are material—viz. any alteration of the date, the sum payable, and the time of payment, the place of payment and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent. An alteration in the number of a bank-note has been held material, though the contract was unaffected thereby, and the plaintiff was a *bonâ fide* holder for value (Suffolk *v.* Bank of England, 9 Q. B. D. 555; see Leeds Bank *v.* Walker, *supra*).

Wills.—Under the Wills Act 1837, s. 21, no obliteration, interlineation or alteration made after execution, shall have any effect, except so far as the words or effect of the will before alteration shall not be apparent (*i.e.*, on the face of the will as left by the testator, *Re* Horseford L. R. 3 P. & M. 211), unless such alteration be executed in the manner required for a will; but the will with such alteration shall be deemed duly executed if the signature of the testator and subscription of the witnesses (the initials of both are sufficient, *Re* Blewitt 5 P. D. 116) be made in the margin, or in some other part opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to it, and written at the end or other part of the will [see Tay. s. 1069; Ros. N. P. 1045].

Presumptions as to Alterations in Deeds, Notes and Wills.—In the absence of evidence to the contrary, alterations, interlineations and erasures appearing on the face of *deeds* (Doe *v.* Catomore, 16 Q. B. 745) and *official documents* (Steevens' Hosp. *v.* Dyas, 15 Ir. Eq. R. N. S. 405) will be presumed to have been made before execution. Alterations in *Wills* (but not the filling in of blanks, Greville *v.* Tylee, 7 Moo. P. C. 327; or interlineations apparently written at the same time and merely completing the sense, *Re* Cadge L. R. 1 P. and M. 143) are presumed to have been made after execution (Simmonds *v.* Rudall, 1 Sim. N. S. 115,

136; Doe *v.* Palmer, 16 Q. B. 747; or even after the execution of any codicils thereto, Lushington *v.* Onslow, 6 Ec. & Mar. Cases 183; Christmas *v.* Whingates 32 L. J. P. & M. 73); probate in the case of unexplained alterations only being granted of the will in its original form (Tay. s. 164). No similar presumptions exist as to the date of alterations in *Bills and Notes* (Johnson *v.* Marlborough, 2 Stark. 313; Bishop *v.* Chambre, M. & M. 116; Knight *v.* Clements, 8 A. & E. 215; Tay. s. 1819; Ros. N. P. 242, 243) or in *other documents*, save that alterations in these will be presumed to have been made at such time and under such circumstances as not to constitute an offence (Tay. s. 1819).

Blanks.—With regard to deeds, the rule is that matters not essential to their operation (*e.g.* the mere insertion of a Christian name) may be filled in after execution, by or with the consent of the grantor, and if his intention is thereby carried out (Eagleton *v.* Gutteridge, 11 M. & W. 465; Tay. s. 1835); but that with respect to matters whose omission nullifies the instrument (*e.g.*, the name of a transferee of shares, and the numbers of the shares) the deed must, after the blanks have been filled in, be re-delivered either by the party himself, or by his agent authorised thereto by deed (Hudson *v.* Revett, 5 Bing. 368; West *v.* Steward 14 M. & W. 49; Société Générale *v.* Tramway Union Co. 14 Q. B. D. 424; 11 App. Cas. 20; Tay. s. 1836, 1837; Ros. N. P. 135.)

With other instruments it is different. Thus, writs and subpœnas may be sealed in blank and filled up afterwards by the applicant. So, a stamped bill form, signed by the acceptor in blank, is valid, and may involve a liability to the full amount covered by the stamp (Bills of Exchange Act, 1882, s. 20, sub-s. 1; Garrard *v.* Lewis 10 Q. B. D. 30).

Stamps.—Except in criminal proceedings, no instrument requiring a stamp "shall be given in evidence, or be available for any purpose whatever," unless (1) it is duly stamped in accordance with the law in force at the time when it was first executed; or (2) if the instrument is one which may be legally stamped after its execution, unless on payment to the officer of the court of the unpaid duty, together with the penalty payable on stamping the same, and of a further sum of one pound (Stamp Act, 1891, s. 14).

Notice of the omission or insufficiency of the stamp must now be taken by the judge, arbitrator, or referee (*id.*). And

under the more stringent language of the present Act, it is presumed that documents not so stamped will now be wholly inadmissible, even as collateral evidence, or to refresh memory. The contrary was the case under the old law [Matheson *v.* Ross, 2 H. L. C. 286 (1849); Ashling *v.* Boon (1891), 1 Ch. 568; but see Interleaf Publishing Co. *v.* Phillips, 1 C. & E. 315, decided under the Act of 1870, where Watkin Williams, J., after consultation with some of the other judges, rejected an unstamped agreement tendered merely for the collateral purpose of contradicting a witness.

No new trial (O. 39, r. 8), or appeal (Blewitt *v.* Tritton, 1892, 2 Q. B. 227), will be allowed where the judge has ruled that the stamp is sufficient, or that none is required. But the ruling of the judge is final only when he decides that the instrument is admissible, and not when he decides that it is inadmissible (Sharples *v.* Richard, 2 H. & N. 57; *In re* Belfort, 9 P. D. 215; see Bowker *v.* Williamson, 5 Times L. R. 382).

Where a document requiring a stamp is lost, or not produced upon notice, it will, in the absence of evidence to the contrary, be presumed to have been duly stamped; but where it is shown to have been unstamped, it will be presumed to have so continued until the contrary is proved (Closmadeuc *v.* Carrel, 18 C. B. 36; Marine Investment Co. *v.* Haviside, L. R. 5 H. L. 624; Ros. N. P. 219–221). [Ros. N. P. 218–270; Powell, 612–619; Tay. s. 397.]

Enrolment and Registration.—Where deeds, memorials, and other instruments are required by statute to be enrolled or registered, the proof of this formality will depend in great measure on the language of the particular Act. But (1) the *certificate or memorandum* of enrolment or registration indorsed on the original instrument returned to the party will in general be evidence both of the fact and date of either act, without proof of the signature or official character of the officer (Doe *v.* Lloyd, 1 M. & Gr. 684; see 12 & 13 Vict. c. 109, ss. 12 & 18; and *ante*, p. 243; and (2) an *office copy* of the enrolment is by several statutes made evidence, not only of the fact of enrolment, but of the contents of the document enrolled (Tay. s. 1649; see the Charitable Trusts Act, 1855, s. 42; and 12 & 13 Vic. c. 109, s. 17).

[Tay. ss. 1645–1653; Ros. N. P. 142–143.]

Ancient Documents.—Documents *thirty years old*, pro-

duced from proper custody and otherwise free from suspicion, prove themselves, and no evidence of the handwriting, signature, or execution need be given [Stark. Ev. 521–524; Tay. ss. 87–88; Steph. art. 88.] As between vendor and purchaser, recitals *twenty years old* are, in the absence of evidence to the contrary, sufficient proof of their contents (Vendor and Purchaser Act, 1874, s. 2; and see Conveyancing Act, 1881, s. 3, sub-s. 3).

Principle.—This rule, established for the sake of general convenience, is founded on the great difficulty and often impossibility of proving handwriting after such a lapse of time (Wynne *v.* Tyrwhitt, 4 B. & A. 377); and on the presumption that the attesting witnesses, if any, are dead,—a presumption which is not allowed to be rebutted by proof that such witnesses are alive or actually in court (Doe *v.* Wooley, 8 B. & C. 22; Doe *v.* Burdett, 4 A. & E. 19; Marsh *v.* Colnett, 2 Esp. 666).

The rule applies not only to wills and deeds requiring attestation, but to letters, entries, receipts, settlement certificates, and indeed to all other written documents (Stark. Ev. 521, note *p*; Tay. s. 88).

The thirty years dates from the execution of the document, and, even in the case of wills, not from the death of the testator (Doe *v.* Wooley, 8 B. & C. 22, decided under the old law; *contrâ* in New York, Jackson *v.* Blanshan, 3 Johns. 292). In the case of documents of title, acts of possession thereunder should be shown, though the absence of such evidence goes merely to weight and not to admissibility (*ante*, p. 51; in America such corroboration is obligatory, see Chamberlayne's Best, p. 216, *note*).

It seems doubtful whether the above rule applies to documents sealed by a court or corporation, since such seals, being of a permanent character, are not rendered more difficult of proof by lapse of time (R. *v.* Bathwick, 2 B. & Ad. 648; Tay. s. 87). So, in the case of declarations made by deceased persons in the course of duty, or as to pedigree, the rule has not always been followed (*ante*, p. 169).

Proper Custody.—The proper custody of a document means its deposit with a person and in a place where it might naturally and reasonably be expected to be found, if authentic [Tay. ss. 659–664; Stark. Ev. 291–293, 524–529; Ros. N. P. 102–103; Powell, 182–185; Steph. art.

88]. Such a custody is sufficient, although there might be another which would be more strictly and absolutely proper (Meath *v.* Winchester, 3 Bing. N. C. 183; Croughton *v.* Blake, 12 M. & W. 205).

Principle.—The proof is required not as a ground of reading the document, but to afford the judge reasonable assurance of its genuineness as being what it purports to be (Doe *v.* Phillips, 8 Q. B. 158; Bidder *v.* Bridges, 34 W. R. 514).

Where the party who tenders the instrument is also the proper depository, no proof of custody is needed (Stark. 525–526; Doe *v.* Phillips, *supra*; Doe *v.* Keeling, 11 Q. B. 884; *contra*, Evans *v.* Rees, 10 A. & E. 151, is probably over-ruled on this point). Thus, it is sufficient for overseers to produce an old parish certificate without showing whence it came (R. *v.* Ryton, 5 T. R. 259; Fry *v.* Wood, 2 Sel. N. P. 564;) or for a corporation to produce ancient corporation documents (R. *v.* Netherthong, 2 M. & S. 337, 338; Brett *v.* Beales, M. & M. 416).

In other cases the propriety of the custody must generally be proved, whether the document be of a public or private nature (Stark. Ev. 291), or tendered as primary or secondary evidence (Bidder *v.* Bridges, *supra*). The proper custody of parish registers of baptism and burial is at the incumbent's residence or the church, and not, unless explained, with the parish clerk (Doe *v.* Fowler, 14 Q. B. 700); that of ecclesiastical terriers and vicars' books is in the church chest, or the registry of the bishop or archdeacon (Armstrong *v.* Hewitt, 4 Price, 216; Bidder *v.* Bridges, *supra*), and not with a mere landowner in the parish (Tay. s. 661); that of family bibles is with a member of the family (Hubbard *v.* Lees, L. R. 1 Ex. 255; *ante*, p. 198). So the poor-house of a union is not an improper repository for documents of any parish within the union (Slater *v.* Hodgson, 9 Q. B. 727). And a case stated by a former bishop for the opinion of counsel, and preserved with his private papers and family documents, has been admitted, although the opinion related in some respects to the See, and might not improperly have been preserved in the public registry of the diocese (Meath *v.* Winchester, *supra*). So, expired leases are admissible which come from the custody either of the lessor or his agent or solicitor (Plaxton *v.* Dare, 10 B. & C. 17; Doe *v.* Phillips, *supra*; Doe *v.* Keeling, *supra*); or

from that of the lessee (Hall *v.* Hall, 3 M. & Gr. 242). Again, a ledger-book and chartulary of an abbey produced by the owner of some of the lands of the abbey, though he was not the principal proprietor nor the owner of the particular farm in question, is admissible (Bullen *v.* Michel, 2 Price 399).

On the other hand, a manuscript enumerating the possessions of a dissolved monastery, and produced from the Herald's Office (Lygon *v.* Strutt, 2 Anstr. 601); a manuscript book containing a grant to an abbey produced from the Bodleian library at Oxford (Michell *v.* Rabetts, cited 3 Taunt. 21); and a grant to a priory produced from the Cottonian MSS. in the British Museum (Swinnerton *v.* Marquis of Stafford, 3 Taunt. 21; Bidder *v.* Bridges, *supra*), have been rejected because the possession of the documents was not connected with an interest in the property.

SECONDARY EVIDENCE.—Forms of Secondary Evidence.—The following are the various forms in which secondary evidence of the contents of documents may be given:—

(A) COPIES which may be either—

(1) *Government Printer's copies—i.e.*, copies printed by the Queen's printer, or the Government printer, or under the authority of her Majesty's Stationery Office (Documentary Evidence Act, 1882, s. 2); or that of the Legislature of any British colony or possession (31 & 32 Vict. c. 37, ss. 2, 3).

(2) *Government Gazette copies* (*ante*, p. 215).

(3) *Copies sealed by foreign States, &c.—i.e.*, copies sealed with the seal of any foreign or colonial State or court of justice (14 & 15 Vict. c. 99, s. 7).

(4) *Exemplifications.*—An exemplification (a medium of proof which is now practically obsolete) is a copy of a record set out either under the Great Seal, or under the seal of the court in which the record is preserved. Both species of exemplifications are provable by mere production, their seals being judicially noticed (*ante*, p. 9), and they are of higher credit than ordinary examined copies, being presumed to have undergone a more careful comparison [Tay. ss. 1536–1537; Ros. N. P. 96; Steph. art. 77].

(5) *Office copies.*—An office copy is a copy of a judicial

document made by an officer appointed for that purpose. All copies, certificates, and other documents appearing to be sealed with the seal of the central office are now presumed to be office copies, or certificates, or other documents issued from the central office, and if duly stamped, may be received in evidence, and no signature or other formality, except the sealing with the seal of the central office, shall be required for the authentication of any such copy, certificate, or other document (O. 61, r. 7). Office copies of all writs, records, pleadings, and other documents filed in the High Court are admissible therein to the same extent as the originals (O. 37, r. 4); but copies made by officers of other courts are only admissible in the same court and cause. [Tay. ss. 1538–1547; Ros. N. P. 97; Steph. art. 78.]

(6) *Certified Copies.*—A certified copy is a copy signed and certified as true by the officer to whose custody the original is entrusted. Unless, however, otherwise provided by statute, a certified *extract*, or certificate of the *result or effect* of a document is not admissible (Finlay *v.* Finlay, 31 L. J. Mat. 140; R. *v.* Newman, Dears. C. C. 85, as to which case see Ros. N. P. 207; *ante*, p. 238). If a certificate *purport* to be verified in the manner provided by the statutes which render them admissible, they may be given in evidence without proof of the seal, signature, or official character of the party verifying them (Documentary Evidence Act, 1845, s. 1.) [Tay. ss. 1599–1659; Ros. N. P. 98–102; Steph. art. 79.]

(7) *Entries in Registers.* — In a few cases entries in public registers are admissible as secondary evidence of lost documents (see Humble *v.* Holt, Coombs *v.* Coether, Bidder *v.* Bridges, cited *ante*, pp. 224–225; Irish Society *v.* Derry, cited p. 235; and see also *ante*, p. 369).

(8) *Examined Copies.*—An examined copy is a copy sworn to be a true copy by a witness who has examined it line by line with the original, or who has examined the copy while another person read the original (Reid *v.* Margison, 1 Camp. 469); or (which is necessary only in peerage cases), who has alternately with such person read and examined both (Slane Peerage case, 5 C. & F. 42). The original must be in characters and a language which the witness understands (Crawford Peerage case, 2 H. L. C. 544)); and the copy must not contain abbreviations not

appearing in the original (R. *v.* Christian, Car. & M. 388). It may also be necessary to show that the original was in proper custody (Adamthwaite *v.* Synge, 1 Stark. 183).

(9) *Counterparts, Drafts, Abstracts, &c.*—Counterparts, though primary evidence against the parties executing them, are, as we have seen, only secondary evidence against a non-executing party. So *drafts* from which, by their indorsements, the deeds appear to have been engrossed, are secondary evidence of the deeds (Waldy *v.* Gray, L. R. 20 Eq. 238, 250: as to drafts of wills, see Sugden *v.* St. Leonards, *infra*, p. 375). An *abstract* compared with a deed of feoffment has been held good secondary evidence of the latter, no proof being given on either side of the existence of a copy (Doe *v.* Wainwright, 5 A. & E. 520; Moulton *v.* Edmonds, 29 L. J. Ch. 181). And *recitals*, though generally speaking only evidence between the parties to the deed (*ante*, pp. 51, 125), are on questions of title receivable as secondary evidence of missing deeds even between strangers (Moulton *v.* Edmonds, *supra*). So, *memorials* or even examined copies of the registry, have been admitted as secondary evidence of an indenture, not only against parties to the deeds, but even against third persons (Sadlier *v.* Biggs, 4 H. L. C. 435; Tay. s. 419, and cases cited: Mr. Taylor remarks that their reception was based on special circumstances—*e.g.*, where the parties had been acting under the deeds, or where they had been recited or referred to in other documents admissible in the cause.)

(10) *Machine and Printed Copies.*—A copy made by a copying machine is regarded only as secondary evidence of the original (Noden *v.* Murray, 3 Camp. 228). And printed, lithographed, and photographed copies—though, as we have seen, primary evidence of each other's contents—are merely secondary evidence of the common original (*ante*, p. 360).

(B) ORAL EVIDENCE.—The contents of documents may be proved as secondary evidence by the recollection of witnesses who have read them. A party cannot, however, compel his opponent to admit the contents of a document in the witness-box (Darby *v.* Ouseley, 1 H. & N. 1; Whyman *v.* Garth, 8 Ex. 803; *ante*, p. 125), although an admission out of Court is primary evidence of such contents against him (*ante*, pp. 125, 360).

(C) STATEMENTS OF DECEASED PERSONS.—In many cases statements or entries made by deceased persons under circumstances entitling them to admission as exceptions to the hearsay rule, may be tendered as secondary evidence of the contents of documents. Thus, an entry against interest made in a rent-book by a deceased landlord has been received as secondary evidence of a lost lease (Connor *v.* Fitzgerald, 11 L. R. Ir. Ch. 106; La Touche *v.* Hutton, 9 Ir. Eq. 166; *ante*, pp. 171, 172). So, copies in the handwriting of deceased clerks made in the course of their duty to their employers have frequently been admitted as secondary evidence of documents (see cases, *ante*, pp. 179, 180). As to the admissibility of copies and abstracts of deeds, &c., on questions of public and general interest, see *ante*, pp. 185, 186; and as to declarations by testators, and drafts authenticated by them, as secondary evidence of a lost will, see Sugden *v.* St. Leonards, 1 P. D. 154; *ante*, pp. 109–112.

Degrees of Secondary Evidence. Copies of Copies.—The general rule is that there are no degrees in secondary evidence; and that a party is at liberty (subject of course to observation where more satisfactory proof is withheld) to adduce any description of secondary evidence he may choose (Doe *v.* Ross, 7 M. & W. 402; Hall *v.* Hall, 3 M. & G. 242; Brown *v.* Woodman, 6 C. & P. 206; Tay. ss. 550–553; Best. s. 483).

Principle.—The reason assigned is the inconvenience of requiring evidence to be strictly marshalled according to its weight; and of compelling a party, before tendering inferior evidence, to account for the absence of all which is of superior value, but the very existence of which he may have no means of ascertaining (Tay. s. 551).

There are, however, exceptions to the rule. Thus, the contents of *public documents* are provable by copies properly authenticated, and not by oral evidence (Breton *v.* Cope, 1 Peake 43; Marsh *v.* Colnett, 2 Esp. 665), and only when the originals are lost and copies are not obtainable will such evidence be admitted (Thurston *v.* Slatford, 1 Salk. 214, 285; McDougal *v.* Young, Ry. & M. 392). So with the *depositions* of witnesses taken before a magistrate or coroner, parol testimony or a copy of the deposition can only be given when the original is lost, destroyed, or in the possession of the opposite party, who refuses to produce it

after notice (R. *v.* Wylde, 6 C. & P. 380). Moreover, a *copy of a copy* is, with rare exceptions (see Charitable Trusts Act, *ante*, p. 369; Sadlier *v.* Biggs, *ante*, p. 374), inadmissible, although the second copy is proved to have been compared with the first, and the first with the original, such evidence being of too loose a nature to be relied upon (Liebman *v.* Pooley, 1 Stark. 167; Everingham *v.* Roundell, 2 M. & R. 138).

Cases in which Secondary Evidence is Admissible.—Secondary evidence of the contents of documents may be given in the following cases:—

(1) *When the Original is a Public Document.*—On grounds of convenience, the contents of public documents may and ought to be proved by secondary evidence (Tay. s. 439). Indeed, no affidavit or record of the court can without the order of a judge or master be taken out of the central office, nor can a *subpœna* for the production of such document in any case be issued (O. 61, rr. 28–31). So, no banker or officer of a bank, is, in any legal proceedings to which the bank is not a party, compellable to produce the bank books, or appear as a witness to prove their contents, unless by order of a judge for special cause (Bankers' Books Evidence Act, 1879, s. 6; *ante*, p. 249).

(2) *When the Original is in the Possession of the Adversary.*—When a document is in the possession of the adverse party or of some one bound to give up possession thereof to him (*e.g.*, his solicitor, Irwin *v.* Lever, 2 F. & F. 269; banker, Partridge *v.* Coates, Ry. & M. 156; deputy, Taplin *v.* Atty, 3 Bing. 164; agent or servant, Baldney *v.* Ritchie, 1 Stark. 338; but not a stakeholder, Parry *v.* May, 1 M. & R. 279; an assignee, Knight *v.* Martin, Gow, R. 103; or a person under whom the adversary justifies in an action of trespass, Evans *v.* Sweet, Ry. & M. 83), and such party refuses to produce it either after notice, or when notice is excused, the other party may give secondary evidence of its contents.

The possession may be proved by showing that the document was last seen in the adversary's hands; or by calling his solicitor, who may be compelled to testify to its possession (*ante*, p. 104); or by the admission of his counsel (Duncombe *v.* Daniell, 8 C. & P. 222); or, presumptively, by showing that it belongs exclusively to him, or would in

the ordinary course of business be in his custody (Henry *v.* Leigh, 3 Camp. 502; Robb *v.* Starkey, 2 C. & K. 143; Tay. s. 440). The adversary may, on the other hand, interpose evidence to disprove the possession; but he cannot escape the effect of the notice by voluntarily parting with the document after the notice, or even perhaps before, unless he discloses the name of the transferee (Knight *v.* Martin, Gow, R. 103; Sinclair *v.* Stevenson, 1 C. & P. 585).

Notice to Produce.—The object of a notice to produce is to enable the adversary to have the document in court, and if he does not, to enable his opponent to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to procure the original (Dwyer *v.* Collins, 7 Ex. 639, 647).

It must, in civil cases (O. 32, r. 8; O. 66, r. 1), but not in criminal (Smith *v.* Young, 1 Camp. 440), be in writing, and be served either on the party or his solicitor; but it is sufficient to leave it with a servant at the residence of the former, or with a clerk at the office of the latter (Evans *v.* Sweet, Ry. & M. 84; Doe *v.* Martin, M. & Rob. 242). The service on ordinary days should be before 6 P.M., and on Saturdays before 2 P.M. (O. 64, r. 11). The sufficiency of the service, however, is for the judge, who must be satisfied that it was such that the recipient might, by using reasonable diligence, have complied with the notice (Lloyd *v.* Mostyn, 10 M. & W. 483).

Proof of the fact and time of service may be given by affidavit of the solicitor or his clerk (O. 32, r. 8); and fresh notices are not necessary on a new trial (Hope *v.* Beadon, 17 Q. B. 509).

The form of notice may be general—*e.g.*, to produce "all accounts relating to the matters in question in this cause" (Rogers *v.* Custance, 2 M. & Rob. 179); or "all letters written by the plaintiff to the defendant relating to the matters in dispute in the action" (Jacob *v.* Lee, 2 M. & Rob. 33; Morris *v.* Hanser, *id.* 392). And a notice to produce "a letter purporting to enclose an account" will let in secon lary evidence of the account (Engall *v.* Bruce, 9 W. R. 536). But a notice to produce "letters and copies of letters, and all books relating to the cause" has been held too vague to admit secondary evidence of a letter (Jones *v.* Edwards, M'Al. & Y. 139). Inaccuracies will

not vitiate a notice unless the recipient has been misled thereby (Lawrence *v.* Clarke, 14 M. & W. 251).

If the document when produced is inspected or used by the party calling for it, he thereby makes it his evidence; but it is otherwise when, though produced, he declines to inspect or use it (Sayer *v.* Kitchen, 1 Esp. 210).

When Notice to Produce is Unnecessary.—Notice to produce is not necessary—(*a*) when the document to be proved is itself a notice which has been served on the adversary (but not on a third person)—*e.g.*, a notice to produce, or to quit, or of action, or of the dishonour of a bill, provided the action is brought upon the bill (Tay. ss. 450–451); (*b*) where, from the nature of the case, the adversary must know that he will be charged with the possession of the instrument—*e.g.*, in an action to recover a bond (Scott *v.* Jones, 4 Taunt. 865); or on a charge of stealing a document (R. *v.* Aickles, 1 Lea. 294); or an indictment for administering an unlawful oath, which was read out from a certain paper (R. *v.* Moore, 6 East 419, *n.*); but not where the matter is collateral—*e.g.*, on a charge of perjury in falsely swearing that a certain draft did not exist (R. *v.* Elworthy, L. R. 1 C. C. R. 103); or on a charge of forgery (R. *v.* Haworth, 4 C. & P. 254); or of arson in setting fire to house to obtain the moneys secured by a policy (R. *v.* Ellicombe, 5 C. & P. 522); so in an action on a cheque where the defendant admits the making, but pleads in avoidance, he cannot call upon the plaintiff to produce the cheque without notice (Goodered *v.* Armorer, 3 Q. B. 956). (*c*) Where the adversary or his solicitor has admitted the loss of the document (R. *v.* Haworth, 4 C. & P. 254; Tay. s. 455; a party cannot, however, prove the destruction of a document traced to his opponents' possession, and then tender secondary evidence thereof, unless he has first given notice to produce, for the adversary may dispute the destruction, Doe *v.* Morris, 3 A. & E. 46). (*d*) Where the adversary or his solicitor has the document in court (Dwyer *v.* Collins, 7 Ex. 639; Tay. s. 456.) (*e*) Where the adversary has obtained possession of the document by fraud or force (Leeds *v.* Cook, 4 Esp. 256; Tay. s. 453). (*f*) Merchant seamen are allowed to give secondary evidence of the contents of their agreements with the masters of their ships without giving notice to produce the originals (17 & 18 Vict.

c. 104, s. 165; Bowman *v.* Manzelman, 2 Camp. 315; Tay. s. 454).

[Tay. ss. 440–456 *a*; Ros. N. P. 7–14; Powell, 591–599; Steph. art. 72.]

(3) *When the original is in the possession of a stranger* not compellable by law to produce it (*e.g.*, a State Paper, title-deed, incriminating document, or one which he holds as trustee, solicitor, or mortgagee for another, see *ante*, pp. 93–116), and who refuses to produce it either when summoned as a witness with a *subpœna duces tecum* (Marston *v.* Downes, 1 A. & E. 31; Mills *v.* Oddy, 6 C. & P. 728), or when sworn as a witness without a subpœna, but admitting that he has the document in court (Doe *v.* Clifford, 2 C. & K. 448; Newton *v.* Chaplain, 10 C. B. 356). Mere disobedience to produce the document will not, however, let in secondary evidence thereof (Jesus Coll. *v.* Gibbs, 1 Y. & C. Ex. R. 156); the witness must be justified in his refusal, for otherwise the party has no remedy except as against him (R. *v.* Llanfaethly, 2 E. & B. 940).

(4) *When the original has been destroyed or lost* (Tay. ss. 429–437). The party must give some evidence that the document once existed (Doe *v.* Wittcomb, 6 Ex. 601); and must then prove its destruction, positively or presumptively, or establish its loss, either by the admission of the adversary or his solicitor (R. *v.* Haworth, 4 C. & P. 254), or by proof that it cannot be found after diligent search.

Search.—The sufficiency of the search necessary to let in secondary evidence is a preliminary question for the judge, and will vary with the importance of the document and other circumstances. It is enough if the party has in good faith exhausted all the sources and means which the nature of the case suggested, and which were reasonably accessible to him (R. *v.* Saffron Hill, 22 L. J. M. C. 22). It is not necessary that the search should be recent, or made for the purposes of the trial (Fitz *v.* Rabbits, 2 M. & Rob. 60); and hearsay evidence of the answers given by persons likely to have had the document in their custody is admissible (R. *v.* Braintree, 28 L. J. M. C. 1; R. *v.* Kenilworth, 7 Q. B. 642). Where there is one person chiefly interested in a document, inquiry should be made of him; where two persons have an equal title to its custody—*e.g.*, master and appren-

tice, or lessor and lessee—inquiry should be made of both; though this strictness is not perhaps legally necessary, for in the former case search among the papers of the apprentice (R. *v.* Hinckley, 3 B. & S. 885), and in the latter among those of the lessor (Brewster *v.* Sewell, 3 B. & A. 301), has been deemed sufficient.

(5) *When production of the original is physically impossible or highly inconvenient—e.g.*, inscription on walls, tombstones, and the like (Mortimer *v.* M'Callan, 6 M. & W. 67; Bruce *v.* Nicolupolo, 11 Ex. 129); but where a notice was merely suspended to a wall by a nail, it was held necessary to produce it at the trial (Jones *v.* Tarleton, 9 M. & W. 675). Inscriptions on banners and coaches, resolutions read at public meetings, and the like, are sometimes regarded rather as speeches or acts done than as documents, and are then provable by oral testimony without reference to the present rule (Tay. s. 417; Powell, 157; *ante*, p. 30).

The rule applies equally where a private document is in the hands of a person resident *abroad* who refuses to produce it (Boyle *v.* Wiseman, 10 Ex. 647; 11 Ex. 360; Kilgour *v.* Owen, L. T. Nov. 2 1889); or is filed in a foreign court (Crispin *v.* Doglioni, 32 L. J. P. & M. 109; in such case the application should be made to the legal and not merely to the actual custodian, *id.*) Foreign public documents may be proved by copies under this rule (Burnaby *v.* Baillie, 42 Ch. D. 282), as well as under (1), *supra*.

(6) *In interlocutory proceedings* secondary evidence may be given of documents without accounting for the absence of the originals, in analogy to the practice which allows deponents in such cases to speak to their information and belief (Spencer *v.* Bailey, L. T. July 2, 1892; *ante*, p. 121). So, such evidence is frequently allowed on preliminary inquiries (Tay. s. 463).

The rules allowing testimony of the *result of unproduced documents*, and of *acting in a public office without production of the written appointment*, have been considered to constitute further instances of secondary evidence; but in the former case the testimony is equally admissible when the documents *are* produced (*ante*, p. 346), and in the latter it can only be tendered in proof of the fact, and not of the terms of the appointment (*post*, Chap. XLV.).

CHAPTER XLIV.

PROOF OF PARTICULAR DOCUMENTS,—PUBLIC, JUDICIAL, AND PRIVATE.

PUBLIC DOCUMENTS.—Public documents are usually divided into *judicial* and *non-judicial;* but in the present chapter the latter class only, on account of its wider admissibility, will be referred to under this head, the former being treated under a separate heading.

Statutes.—Public statutes and all others passed since February 14, 1851, unless the contrary is expressly declared (13 & 14 Vict. c. 21, ss. 7, 8), are judicially noticed as part of the law of the land. No evidence of their contents is therefore necessary, though for certainty of recollection reference is had to printed copies (not necessarily examined copies or copies published by the Queen's printer), or, where the accuracy of these is questioned, to the Parliament Roll itself (Price *v.* Hollis, 1 M. & S. 105). In cases other than the above, the Acts may be proved by copies purporting to be printed either by the Queen's printer or under the authority of H.M. Stationery Office (8 & 9 Vict. c. 113, s. 3; 45 Vict. c. 9, s. 2); or where there are no such copies, by an examined copy shown on oath to have been compared with the Roll.

[Tay. ss. 1523–1524; Ros. N. P. 104–105; Powell, 334–335; Steph. arts. 58, 81.]

Treaties, Charters, Letters-Patent, &c.—Treaties, charters, letters-patent, Crown grants, pardons, and commissions are provable by production of the original, or by exemplifications, or by examined copies (Tay. s. 1526; Ros. N. P. 106, 107). Letters-patent for inventions being now sealed with the seal of the Patent Office are judicially noticed (46 & 47 Vict. c. 57, s. 84); and certified and sealed copies of patents, specifications, disclaimers, and registers are admissible without production of the originals (s. 89).

Proclamations and Orders in Council.—Royal proclamations, and orders and regulations issued by the Government may be proved, like other public documents, by the production of the originals or by examined copies thereof; or, in the case of proclamations, by copies purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament (8 & 9 Vict. c. 113, s. 3).

In addition to these methods of proof it is enacted by the Documentary Evidence Act, 1868, s. 2, that *primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act, by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

(1) By the production of a copy of the *Gazette* purporting to contain such proclamation, order, or regulation [see *ante* p. 215].

(2) By the production of a copy of such proclamation, order, or regulation, purporting to be printed by the Government printer, or, where the question arises in a court of any British colony or possession, of a copy purporting to be printed under the authority of the Legislature of such British colony or possession. [The Documentary Evidence Act, 1882, ss. 2, 4, has extended this provision to copies purporting to be printed by a printer to Her Majesty in Ireland, or by any printer in England or Ireland acting under the superintendence or authority of Her Majesty's Stationery Office. The production of such copies is also *primâ facie* evidence of the publication of the order (Huggins *v.* Ward, L. R. 8 Q. B. 521).]

(3) By the production, in the case of any proclamation, order, or regulation, issued by Her Majesty or the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of Privy Council, or by any of the Lords or others of the Privy Council; and in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the

person or persons specified in the second column of the said schedule in connection with such department or officer.

Any copy or extract made in pursuance of this Act may be in print, or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy or extract from any proclamation, order, or regulation.

By s. 6 the provisions of the above Act are to be deemed in addition to, and not in derogation of, any existing statutory or common law powers of proving documents.

SCHEDULE AS AMENDED BY SUBSEQUENT ACTS.

COLUMN I. (*Name of Department or Officer.*)	COLUMN II. (*Names of Certifying Officers.*)
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade.	Any member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Commissioners.
The Poor Law Board (now abolished; see Local Government Board, *infra*).	Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said Board.
The Local Government Board (see 34 & 35 Vict. c. 70, s. 5; 38 & 39 Vict. c. 55, ss. 130, 135, 297, sub-s. 7; and 41 & 42 Vict. c. 52, s. 265, Ir.)	Any Member of the Local Government Board, or any Secretary or Assistant Secretary of that Board.
The Education Department (see 33 & 34 Vict. c. 75, s. 83).	Any Member of the Education Department, or any Secretary or Assistant Secretary of that Department.
The Postmaster General (see 33 & 34 Vict. c. 79, s. 21; and also 44 & 45 Vict. c. 20, ss. 6, 7; and 47 & 48 Vict. c. 76, s. 15).	Any Secretary or Assistant Secretary of the Post Office.

Foreign and Colonial Treaties, Proclamations, and other Acts of State are provable by examined copies, or by copies purporting to bear the seal of the State or colony to which they belong (14 & 15 Vict. c. 99, s. 7).

Parliamentary Journals are provable by copies purporting to be printed by the printers to the Crown, or by the printers of either House of Parliament (8 & 9 Vict. c. 113, s. 3).

The General Records of the Realm in the custody of the Master of the Rolls are provable by copies certified by the deputy-keeper of the records, or one of the assistant record-keepers, and purporting to be sealed or stamped with the seal of the Record Office; and when so authenticated they are receivable before all legal tribunals without further proof in every case in which the original record could be received (1 & 2 Vict. c. 94, ss. 12, 13; Tay. s. 1485).

The records, both public and judicial, deposited in the above custody include, *inter alia*, all the records of the superior courts of common law, equity and admiralty which are more than *twenty years old*; the records formerly in the custody of the Queen's Remembrancer; the records of the Land Revenue Record Office, the Lord Chamberlain's Office, and the Augmentation Office; the log-books of the navy; various records of forfeited estates; duplicates of land and assessed taxes; the records of the Court of Wards and Liveries; and those of first fruits and tenths; Domesday Book; Parliament, statute, patent and close rolls; some of the Crown land surveys; and the lieger books and chartularies of the dissolved monasteries (Tay. s. 1485; as to other documents of a public nature which are deposited in particular courts or offices, see Tay. s. 1486).

Public Registers, Inquisitions, and Surveys. Corporation Books. Certificates.—It is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint-stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they are respectively authenticated in the manner prescribed by such statutes (8 & 9 Vict. c. 113, preamble).

Whenever by any Act now or hereafter in force any such

certificate, &c., is so receivable, it is admissible if it *purports* to be authenticated in the manner prescribed, and no proof need be given of the stamp, seal, or signature, or of the official character of the person appearing to have signed the same (s. 1; see as to this Act, Tay. s. 7; Ros. N. P. 116; Steph. art. 79; the signature of the *de facto* custodian of a record is sufficient, though he be not the officer *de jure*, R. *v.* Parsons. L. R. 1 C. C. R. 24).

For a list of the various statutes making certified copies of documents of a public nature evidence, see Ros. N. P. 98–100; Tay. ss. 1602–1609.

Whenever any book or other document is of *such a public nature as to be admissible in evidence on its mere production from the proper custody*, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible provided it be *proved* to be an examined copy or extract, or *purport* to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted (14 & 15 Vict. c. 99, s. 14). Where the copy is signed and certified as the section provides it is admissible on its mere production in court (R. *v.* Weaver, L. R. 2 C. C. R. 85); where it is informally certified and therefore inadmissible, it may be proved to be an examined copy, the provisions of the section being cumulative (R. *v.* Mainwaring, 26 L. J. M. C. 10, 14).

For a list of some of the principal public documents which may be proved by copies under this section, see Tay. s. 1600; Ros. N. P. 101, 102.

Registers.—The statutory registers enumerated *ante*, p. 223 *et seq.*, are provable either by production of the originals from proper custody; or by certified copies under the various Acts rendering them admissible, it being now sufficient if such copies merely purport to be duly certified (8 & 9 Vict. c. 113, s. 1, *supra; Re* Hall, 22 L. J. Ch. 177); or by examined copies.

Public registers admissible as such by common law may also be proved either by production or by examined or certified copy under 14 & 15 Vict. c. 99, s. 14, *supra*.

Non-parochial registers deposited with the Registrar-General must in criminal cases be proved by production and not by copy (3 & 4 Vict. c. 92, s. 17). So, in peerage cases, the original registers must in all cases be produced if

English, but not perhaps if Irish or Scotch (Hubb. Ev. of Succ. 97, 98). And the same rule holds where registers inadmissible as public documents are received on other grounds (R. *v.* Gwyn, 1 Stra. 401).

Old Indian registers of baptism and marriage are provable either by production of the copies transmitted to, and now deposited at, the India Office (Queen's Proctor *v.* Fry, 4 P. D. 230), or probably by examined or certified copies of the original registers under 14 & 15 Vict. c. 99, *supra*.

Foreign registers are provable by examined copy, the originals in general not being allowed to be removed (Abbott *v.* Abbott, 29 L. J. P. M. & A. 57; Burnaby *v.* Baillie, 42 Ch. D. 282).

Inquisitions, Surveys, Extents and the like (see *ante*, p. 231, *et seq.*) seem, notwithstanding 14 & 15 Vict. c. 99, s. 14, to be provable by production of the original from proper custody and not generally by copies, unless the originals have been lost or destroyed.

Where the inquisition is taken *ex officio* under a general commission, or under a special commission relating to a matter of general concernment, or where the inquisition is ancient, the return may be read without producing, or accounting for the absence of, the commission under which it was taken. But in other cases the commission must be produced, or accounted for, to show that the inquisition was taken under proper authority.

[Tay. ss. 1582, 1585; Ros. N. P. 110, 111.]

Assessments of land-tax, poor-law valuations in Ireland, and perhaps poor-rate books, are provable by the production of the original books containing the rate or assessment, or by examined or certified copy under 14 & 15 Vict. c. 99, s. 14 (Tay. s. 1600).

Corporation and Bankers' Books.—At common law, entries in corporation books which are of a public nature are provable either by the production of the original books or by examined copies (Brocas *v.* Ld. M. of London, Stra. 307), or now probably by certified copies under 14 & 15 Vict. c. 99, *supra*. Entries of a private nature must be proved by production of the originals, and copies though long preserved among the corporate muniments are not admissible (R. *v.* Gwyn, 1 Stra. 401). Minute books and registers kept as authorised by the Companies Clauses

Consolidation Act, 1845, the Companies Act, 1862, the Municipal Corporation Act, 1882, and similar statutes, are provable by production of the original and not by copies (*ante*, pp. 246–247). As to Bankers' Books, see *ante*, p. 249.

[Tay. ss. 596; Ros. N. P. 123, 124; Powell, 365, 366.]

Bye-laws.—The proof of bye-laws varies according to the language of the particular statute authorizing them. Under the Companies Clauses Consolidation Act, 1845, s. 127, the bye-laws of companies regulated by that Act are provable by written or printed copies purporting to be sealed with the common seal of the company, which are sufficient evidence thereof in all prosecutions under the same. So, under the Municipal Corporation Act, 1882, s. 24, a written copy of any bye-law under that Act is similarly admissible if authenticated by the corporate seal. The bye-laws of Railway Companies in order to affect strangers must be proved to have been duly published, and the originals, or examined or certified copies, must be produced (Motteram *v.* Eastern Counties Ry. Co. 7 C. B. N. S. 58).

Certificates are, as we have seen, admissible in evidence if they *purport* to be verified as directed by statute, without proof of the seal, signature, or official character of the party certifying (8 & 9 Vict. c. 113, s. 1).

Manor-Books.—Court rolls are provable either by production of the originals, or by examined copies duly stamped (*ante*, p. 187; Stamp Act, 1891, s. 65).

JUDICIAL DOCUMENTS.—Superior Courts.—Records in the Supreme Court are provable: (1) By production of the originals, for which the order of a judge or master is now necessary (O. 61, r. 28). Such production is only usual, and even then not perhaps strictly necessary, on a plea of *nul tiel record*, or a charge of perjury in an affidavit, or forgery of a record (Tay. s. 1535; Ros. N. P. 114; Ros. Cr. Ev. 158; Steph. Dig. *note* xxx.). (2) By exemplification under the Great Seal or seal of the court to which the record belongs, a method of proof which is now rarely employed. (3) By examined copy (Tay. s. 1534). (4) By office copy (O. 37, r. 4, which provides that office copies of all writs, records, pleadings and documents filed in the High Court shall be admissible in evidence in all causes and

matters, and between all persons and parties, to the same extent as the original would be admissible).

Old civil records in the custody of the Master of the Rolls are provable by certified copies (*supra*, p. 384), or where the record is lost by a certified copy of the entry in the judgment book in the same custody (*Ex parte*, Anderson, 14 Q. B. D. 606). All records and documents of the old Common Law side of the Court of Chancery filed or deposited in the Petty Bag Office may be proved by office copy (12 & 13 Vict. c. 109, s. 13).

Probates and Letters of Administration.—The primary modes of proving probate or letters are: (1) by production of the document itself when the seal will be judicially noticed; or (2) by production of the Act-book or register, which it seems will be admissible without accounting for the non-production of the probate or letters (Cox *v.* Allingham, Jacob 514); or (3) by a certified or examined copy of the Act-book or register (14 & 15 Vict. c. 99, s. 14); or (4) when no other record has been kept, by production of the original will, bearing the indorsement of the surrogate or deputy-registrar that the executor has proved it and that probate has passed the seal (Doe *v.* Mew, 7 A. & E. 240; Gorton *v.* Dyson, 1 B. & B. 219).

The original will can under no circumstances be admitted to prove title to personal estate (Pinney *v.* Pinney, 8 B. & C. 335; Pinney *v.* Hunt, 6 Ch. D. 243; though *aliter* when required merely to prove a declaration by the testator, *ante*, p. 198, or to construe the will, Turner *v.* Hellard, 30 Ch. D. 390).

By 20 & 21 Vict. c. 77 s. 22, all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof respectively, purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof.

[Tay. ss. 1588 & 1590; Ros. N. P. 117, 118; *ante*, pp. 300–301].

Bankruptcy Proceedings.—Petitions, orders, certificates, affidavits, and other documents (or copies thereof) used in the course of any bankruptcy or other proceeding under the Act, shall, if they appear to be sealed with the seal of any bankruptcy court, or purport to be signed by the judge, or are certified as true copies by the registrar, be receivable

in evidence in all legal proceedings whatever (Bankruptcy Act, 1883, s. 134). And all documents purporting to be orders or certificates made or issued by the Board of Trade and to be sealed with the seal of the Board, or to be signed by a secretary or assistant-secretary of the Board, or any person authorized in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates without further proof unless the contrary is shown (s. 140). So, a minute of proceedings at a meeting of creditors under this Act, signed at the same or next ensuing meeting by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof (s. 133. As to the *effect* of such minutes as evidence of the facts stated, see *ante*, p. 226).

County Court Proceedings.—By the County Courts Act, 1888, s. 28, the registrar's book kept under the Act, or copies of entries therein bearing the seal of the Court and purporting to be signed and certified as true copies by him, shall be admitted as evidence of the entries and proceedings referred to and of the regularity of such proceedings without any further proof. This clause does not seem to dispense with proof of the seal, though perhaps this is cured by 8 & 9 Vict. c. 113, s. 1, cited *ante*, pp. 384, 385, or by 14 & 15 Vict. c. 99, s. 14, cited *ante*, p. 385 (Ros. N. P. 117).

The entries are conclusive, and the judge himself cannot contradict them by his testimony (Dews *v.* Riley, 20 L. J. C. P. 264; Stonor *v.* Fowle, 13 App. Cas. 20).

Criminal Proceedings.—The trial and conviction or acquittal of any person charged with an *indictable offence* may, without producing the record or a copy thereof, be proved in any proceeding whatever by the certificate (or a document purporting to be such) of the clerk or other officer of the court having the custody of the records, or the deputy of either, which certificate shall contain a copy of the record omitting the formal parts thereof (14 & 15 Vict. c. 99, s. 13; *ante*, p. 241). A previous *conviction* may also, when required to discredit a witness (28 & 29 Vict. c. 18, s. 6), or for any other purpose (34 & 35 Vict. c. 112, s. 18), be proved by a certificate, signed as above, of the substance and effect only of the indictment and conviction (*ante*, pp. 241, 242).

As to certificates of conviction or dismissal with respect to *summary offences*, see *ante*, p. 242. The orders of metropolitan police magistrates may be proved by the production of the minute book, in which they are entered, or by an examined copy thereof (London School Board *v.* Harvey, 4 Q. B. D. 451). As to proof of service of process, see *ante*, p. 315.

Foreign and Colonial Proceedings.—All judgments, decrees, orders, and other judicial proceedings of any court of justice in any Foreign State or British Colony, and all affidavits, pleadings and other legal documents, filed or deposited in any such court, may be proved either by examined copies, or copies purporting to be sealed with the seal of the court to which the originals belong, or where there is no seal to be signed by a judge of such court who must certify that there is no seal. If these conditions exist, no proof is required of such seal, signature or certificate, or of the official character of the judge (14 & 15 Vict. c. 99, s. 7).

Reciprocal Admissibility of Documents in England, Ireland and the Colonies.—Every document which is admissible in England or Wales in proof of any particular, without proof of the seal, stamp or signature thereof, or of the judicial or official character of the person appearing to have signed the same, is admissible to the same extent and for the same purpose in Ireland; and Irish documents are similarly admissible in England and Wales. And documents admissible in either are also admissible in the colonies (14 & 15 Vict. c. 99, ss. 9–11).

Verdicts (see *ante*, p. 302). **Awards** must be proved not only by the production of the award duly executed by all the arbitrators in the presence of each other (Stalworth *v.* Innes, 13 M. & W. 466; Wright *v.* Graham, 3 Ex. 131); but by the production of the submission as well, since otherwise the authority of the arbitrators does not appear (Ferrer *v.* Oven, 7 B. & C. 427; Brazier *v.* Jones, 8 B. & C. 124). Where the submission is by written agreement, execution by all the parties, including those relying on it, must be shown (*ibid.*; even though it has been made a rule of court pursuant to one of the terms, Berney *v.* Read, 7 Q. B. 79); but where the submission is by rule of court or judge's order in an action, production of either respectively is suffi-

cient (Gisborne *v.* Hart, 5 M. & W. 50; Dresser *v.* Stansfield, 14 M. & W. 828). Moreover, where the submission contains any special powers which have been acted on—*e.g.*, to enlarge the time, or to appoint an umpire,—the instrument by which such powers have been exercised must be proved in addition to the submission and prior to proof of the award, a mere recital in the award of the exercise of such powers not being sufficient (Still *v.* Halford, 4 Camp. 19; Davis *v.* Vass, 15 East 97).

The maxim *omnia præsumuntur rite esse acta* will not dispense with strict proof of the above particulars in the case of private arbitrators, although it is otherwise in the case of awards by public officers (R. *v.* Haslingfield, 2 M. & S. 558; Doe *v.* Mostyn, 12 C. B. 268). Thus, under several of the Inclosure Acts, the commissioners' awards are made conclusive evidence of the observance of the statutory formalities. In many instances these and other awards are also provable, under statute, by certified copy (Tay. s. 1607).

[Tay. ss. 1583, 1584; Powell, 352, 353.]

Fines and Recoveries.—As to proof of these, see Ros. N. P. 109. A fine levied by a married woman of lands acquired by descent, is valid even before entry though made without proclamations, nor need her separate examination be shown (Riggs-Miller *v.* Wheatley, 28 L. R. I. 144).

Affidavits, Depositions, Pleadings, Writs.—Except in cases of perjury when the original should, as we have seen, be produced under a master's or judge's order (O. 61, r. 28, *ante*, p. 387), affidavits and depositions, in common with writs, pleadings and other documents filed in the High Court, may be proved by office copy (O. 37, r. 4; O. 38, r. 15; O. 65, r. 27, sub-s. 53, 54; Ros. N. P. 113–115). As to proof of depositions taken in former proceedings, see *ante*, p. 308; and Chap. XLI. Affidavits sworn in the colonies or abroad before any person authorized to administer oaths otherwise than by the law of a foreign country may be proved by mere production, their seals, &c., being judicially noticed (*ante*, pp. 9, 10).

Writs and warrants before they are returned must be proved by actual production; after their return they become matters of record, and may be proved either by production or as above by office copy (Powell, 345; Ros. N. P.

110; R. *v.* Scott, 2 Q. B. D. 415). It must be remembered in this and other cases that a copy served by a party on his opponent is always considered primary evidence of the document as against the former (*ante*, p. 360).

PRIVATE DOCUMENTS.—Private documents must, as we have seen in the last chapter, generally be proved by the production of the originals, coupled with evidence of their handwriting, signature, or execution, as the case may be. The two principal exceptions to this rule are wills and bills of sale.

Wills.—Wills of personalty are ordinarily provable by production of the probate, which is primary evidence of the will, except when merely tendered as evidence of the declarations of the testator (*ante*, pp. 300–302, 361). Wills of realty are also provable by probate in the cases mentioned *ante*, p. 301; but otherwise the will itself must be produced. As against the heir all the attesting witnesses capable of being called must be called; though in an action against the devisee by the heir, all need not be called (Tatham *v.* Wright, 2 Russ. & Myl. 1). [Tay. ss. 1759–1761, 1856; Ros. N. P. 143–150; Powell, 347–352.]

Bills of Sale.—The Bills of Sale Act, 1878, s. 16, provides that "any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall before all courts and before all arbitrators and other persons be admitted as *primâ facie* evidence thereof, and of the fact and date of registration as shown thereon."

A certificate of registration under this Act has been held no evidence that the required affidavit has been filed, or that the filed copy of the bill is a correct copy thereof, where these points were not stated in the certificate (Turner *v.* Culpan, 36 W. R. 278). So, under the Act of 1854, a certificate stating merely that "a document purporting to be an office copy of a bill of sale was registered," was held no evidence that the affidavit required by the Act had also been filed, on the ground apparently that the section did not direct the officer not to file the bill without the affidavit (Wood *v.* Mason, 1 C. P. D. 63). And in another case a certificate which stated that "an affidavit and copy bill of sale" indorsed with the names of the grantor and claimant were filed as required, was held insufficient without producing an

office copy of the bill of sale to show it was the same as that executed (Emmott *v.* Marchant, 3 Q. B. D. 555). In this case, Lush, J., said the certificate was evidence that a document purporting to be a bill of sale had been delivered to the officer, together with an affidavit which was correct in form—*i.e.*, as stating the residence and occupation of the grantor,—and therefore he thought it was not necessary to produce an office copy of the affidavit, but only of the bill of sale.

Having regard to these cases, it will, in proving registration, be prudent to produce office copies both of the bill of sale and affidavit, as mentioned in s. 16 *supra* (Ros. N. P. 1268).

CHAPTER XLV.

ADMISSIBILITY OF EXTRINSIC EVIDENCE TO AFFECT DOCUMENTS.

NOT ADMISSIBLE TO SUPERSEDE OR CONTRADICT.—As a general rule, when a transaction has been reduced into writing, either by requirement of law, or agreement of the parties, the writing becomes the exclusive memorial thereof; and no extrinsic evidence is admissible either to independently prove the transaction, or to contradict, vary, add to, or subtract from, the terms of the document, though the contents of such document may be proved either by primary or secondary evidence, according to the rules stated in the two preceding chapters.

Extrinsic (or as it is often loosely called "parol") evidence is equally inadmissible in this connection, whether it consists of casual conversations, declarations of intention, oral testimony, documents (provided they are of inferior solemnity to the writing in question, Tay. s. 1148), or facts and events not in the nature of declarations; and whether such conversations, &c., were previous or subsequent to, or contemporaneous with, the date of the principal document (Tay. s. 1132).

Principle.—The grounds of exclusion are: (1) that to admit inferior evidence when the law requires superior would be to repeal the law; and (2) that when the parties have deliberately put their intentions into writing, it must be assumed as between themselves that they intended the writing to form a full and binding statement of such intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory.

[Tay. ss. 399–408; 1132–1157; Best, s. 226; Ros. N. P. 1–4; 16–19; Powell, 429–446; Steph. art. 90; Whart. chap. xii.]

To what Documents the Rule Applies.—*Judicial Documents.*—Extrinsic evidence can never be given to supersede or contradict judicial documents. Thus, the record, or a copy thereof, is the only legal evidence of a proceeding in the High Court (Thomas *v.* Ansley, 6 Esp. 80; R. *v.* Page, *ibid.* 83, where parol evidence was rejected even to prove the date on which a cause came on for trial; but as adjournments during sitting are not noticed on the record, such evidence may often afford the only proof of the actual day of trial, Whittaker *v.* Wisbey, 12 C. B. 52). The same rule applies to the memorials of courts not of record, which even the testimony of the judge cannot be received to contradict (Dews *v.* Riley, 20 L. J. C. P. 264; Stonor *v.* Fowle, 13 App. Cas. 20). Where, however, no memorials are kept, the judgment must necessarily be proved by some competent witness (Tay. s. 1572). So an award speaks for itself, and no evidence to supersede, contradict, or vary it, is receivable (*ante*, p. 96); and the date of a prisoner's apprehension must be proved by the warrant and not by parol (R. *v.* Phillips, R. & R. 369). In like manner the statutory deposition of a witness in a civil and criminal proceeding, or the statutory examination of a prisoner, is not only the best but the only proof respectively of what either has stated (Leach *v.* Simpson, 5 M. & W. 309; R. *v.* Coll, 24 L. R. I. 522; R. *v.* Fearshire, 1 Lea. 202; R. *v.* Jacob, *ibid.* 309; Tay. s. 399; Ros. Cr. Ev. 63); and neither the deposition (*ibid.*) nor the examination (R. *v.* Bond, 4 Cox, 236; Tay. s. 893) can be contradicted or varied by extrinsic evidence. As to *additions* to the depositions, there appears to be some doubt. It has been considered that since such documents are now required by statute to contain the whole statement of the deponent or prisoner, and not merely, as formerly, so much only as the justice deems material, all parol additions should be excluded (Tay. s. 893; Ros. Cr. Ev. 58–59; 62–63); but as the new statute has also been held to be satisfied if so much only of the testimony as the justice deems material is included (see *ante*, pp. 336, 337), there seems no valid reason why parol additions should not now (as formerly, Leach *v.* Simpson, *supra*), be admitted.

If no deposition, or an informal one, has been returned, parol evidence of what was said by the witness will not be excluded (Tay. s. 416; Ros. Cr. Ev. 63); so also with the

examination of the prisoner (Tay. ss. 400, 894; *ante*, p. 343).

Private Formal Documents.—Where private documents are required *by law* to be in writing—*e.g.*, wills, contracts within the Statute of Frauds and the like, extrinsic evidence is in like manner inadmissible either to supersede the document, or to contradict, vary, or supplement its terms. And the same rule holds with regard to contracts, grants, and dispositions of property which have been reduced to writing by *agreement of the parties*, and are intended to be complete and operative as such; though here, as will be seen, the rule is less stringently applied.

Exceptions to the Rule.—To the rule as above stated there are several exceptions; though some of these might perhaps more properly be treated as falling outside its scope altogether.

(1) *Public Documents* (for an enumeration of which see *ante*, pp. 213–253) are in general given no exclusive authority by law as instruments of evidence. Thus, an entry of marriage (Evans *v.* Morgan, 2 C. & J. 453; R. *v.* Wilson, 3 F. & F. 119), or of the tonnage of a ship (the *Recepta*, 14 P. D. 131), in a public register; or a certificate of the registration of a company (Agricultural Cattle Company *v.* Fitzgerald, 16 Q. B. 432; R. *v.* Langton, 2 Q. B. D. 296; *ante*, p. 49) will not exclude independent proof of the fact, or contradiction of the document. So, where the proceedings of directors, commissioners, public trustees, and the like, are directed by statute to be entered in minute books, extrinsic evidence of such proceedings is nevertheless receivable (Miles *v.* Bough, 3 Q. B. 845, 872; Inglis *v.* Great Northern Ry. Co., 1 Macq. Sc. Cas. H. of L. 112, 118). Nor will recitals in statutes, gazettes and other official documents exclude independent evidence of the facts recited (Stark, Ev. 718). Foreign written law is, indeed, as we have seen, exclusively provable by the oral testimony of experts (*ante*, p. 258); though *contra*, as to domestic written law (*post*, p. 381).

(2) *Private Documents when* (*a*) *Informal; or* (*b*) *Inter alios.*—(*a*) *Informal:* Extrinsic evidence is admissible to supersede, or to contradict, &c., any document intended by the parties to operate merely as a collateral or informal memorandum of a transaction, and not as a contract or other

binding legal instrument. Thus, a *receipt* will not, even between the parties, unless amounting to an estoppel, exclude extrinsic evidence either to prove the payment, or to contradict the writing (Farrar *v.* Hutchinson, 9 A. & E. 341; Skaife *v.* Johnson, 3 B. & C. 421; Lee *v.* Lanc. and Yorks. Ry. Co., L. R. 6 Ch. 527; as to receipts contained in or endorsed on deeds, see Conveyancing Act, 1881, s. 55; Powell, 273–274.) So, an *order for goods*, insufficient under the Statute of Frauds, will not exclude parol evidence (Lockett *v.* Nicklin, 2 Ex. 91). And where A. sold B. a horse giving him a paper as follows:—"Bought of A. a horse for £7 2*s.* 6*d.*," this was held not to preclude B. from proving that A. had verbally warranted the animal quiet in harness (Allen *v.* Pink, 4 M. & W. 140). So, where there is merely an *unaccepted proposal* in writing, oral evidence of the contract is admissible (Scones *v.* Dowles, 29 L. J. Ex. 122). Again, where an auctioneer sold for £6 an article described in an unsigned *catalogue* as silver, but publicly stated at the sale that it was only plated, evidence of this statement was received, since the contract was really an oral one (Eden *v.* Blake, 13 M. & W. 614); so where lands were let by auction and a paper of the terms of letting was delivered by the auctioneer to the bidder, which paper was not signed by the latter or either of the parties, parol evidence of the terms was received (Ramsbottom *v.* Tunbridge, 2 M. & S. 434; though *aliter* where the paper had been signed by the auctioneer, Ramsbottom *v.* Motley, *ibid.* 445; see also Hawkins *v.* Warre, 3 B. & C. 697, where the same distinction between signed and unsigned papers is taken).—(*b*) *Inter alios:* Where a transaction has been reduced into writing merely by agreement of the parties, extrinsic evidence to supersede or contradict the writing is only excluded in proceedings between such parties, or their privies, and not in those between strangers or a party and a stranger; since strangers cannot be precluded from proving the truth by the ignorance, carelessness, or fraud of the parties; nor in an action between a party or a stranger can the former be estopped, since there would be no mutuality. [R. *v.* Cheadle, 3 B. & Ad. 833; Walton *v.* Shelley, 1 T. R. 301; Smith *v.* Andrews, 1891, 2 Ch. 678; Tay. ss. 1149–1150; Stark. Ev. 725–728; Steph. art. 92; Whart. s. 923.]

(3) *Existence as Distinguished from Terms of Transaction.*—

Extrinsic evidence is admissible to prove the existence as distinguished from the terms of any transaction or relationship which has been reduced into writing, Thus, the existence of a partnership may be shown without producing the deed (Alderson *v.* Clay, 1 Stark. R. 405); evidence of acting in a public office may be given without producing the appointment (*ante*, pp. 49, 380); and the fact of the recovery of judgment as distinguished from its contents may be proved without the record (Henman *v.* Lester, 12 C. B. N. S. 776); so oral evidence is receivable to show that A. agreed to sell goods on commission for B., though the terms of the transaction had been committed to writing (Whitfield *v.* Brand, 16 M. & W. 282). Again, the fact of occupation of land, irrespective of the details of the tenancy, may be proved without producing the lease—*e.g.*, by evidence that the tenant has been seen in occupation, or has paid rent (R. *v.* Holy Trinity, Hull, 7 B. & C. 611; Doe *v.* Harvey, 8 Bing. 239, 242; see, however, Strother *v.* Barr, 5 Bing. 136; Twynam *v.* Knowles, 13 C. B. 222); so the mere relationship of landlord and tenant (Augustein *v.* Challis, 1 Ex. 280, *per* Alderson, B.) may be proved by parol, though it has been held that the actual party under whom the tenant came into possession (Doe *v.* Harvey, *supra*), or to whom a demise has been made (R. *v.* Rawden, 8 B. & C. 708), or the payment of the rent reserved (R. *v.* Merthyr Tidvil, 1 B. & Ad. 29; Augustien *v.* Challis, *supra*) cannot be so shown.

(4) *Fraud, Mistake, Want of Consideration, &c.*—Extrinsic evidence is in general admissible to prove any matter which would affect the validity of a document, or entitle a party to any relief in respect thereof—*e.g.*, fraud, forgery, duress, undue influence, illegality of subject-matter, mistake, want of due execution, want of contractual capacity, or want or failure of consideration.

Fraud, Illegality.—Fraud vitiates all instruments however solemn. Thus, judgments may, as we have seen, be impeached upon this ground, as well as upon others peculiar to that class of documents (*ante*, p. 276). So when a will is impeached for fraud or forgery, evidence of the declarations of a testator is admissible to show his intentions (*ante*, p. 211). And oral fraudulent representations may be proved to defeat a written contract induced thereby (Tay. s.

1136, and cases cited); but in the absence of fraud a parol representation, not amounting to an agreement, on which a lease was granted, gives no cause of action (Burstal *v.* Bianchi, 65 L. T. 678). So, extrinsic evidence is always admissible to show that the object of an agreement is unlawful (see fully on this subject, Pollock on Contracts, 5th ed. pp. 356–377).

Mistake will in some, but not in all, cases let in extrinsic evidence. Thus, the records of courts of justice, being presumed to be correct, cannot generally be rectified by parol, the proper course being to apply to amend the record (see O. 28, r. 11, and notes thereto in Annual Practice). An arbitrator cannot even correct a manifest clerical error in his award after signing it, but should apply to the Court (Mordue *v.* Palmer, L. R. 6, Ch. 22). So, where a verdict and judgment were tendered as evidence of a public way, proof that the verdict was erroneously entered by the officer was rejected (Reed *v.* Jackson, 1 East 355). But where a verdict awarding damages was entered generally, oral evidence was admitted to show that it was recovered on one count only (Preston *v.* Peeke, 27 L. J. Q. B. 424); and as to proof of the actual date of a trial, see *supra*, p. 395; and of the precise issues upon which judgment was given, *ante*, p. 286. So, evidence has been allowed to show that an order of justices was in fact signed three days after its apparent date (R. *v.* Flintshire, 3 Dowl. & L. 537). [Tay. s. 85; Ros. N. P. 21.]

With regard to deeds and contracts, recitals and descriptions of formal matter may generally be corrected by extrinsic evidence. Thus, the recited date of execution of a deed (Steele *v.* Mart, 4 B. & C. 272; Payne *v.* Hughes, 10 Ex. 430) or charter-party (Hall *v.* Cazenove, 4 East 477; Cooper *v.* Robinson, 10 M. & W. 694) may be contradicted; as also may words of description when not operating by way of estoppel—*e.g.*, land described as meadow may be proved to be arable (Skipworth *v.* Green, 1 Stra. 610), or described as containing a certain number of acres may be shown to contain more or less (*ibid.*; Jack *v.* M'Intyre, 12 C. & F. 151; Manning *v.* Fitzgerald, 29 L. J. Ex. 24); and a lease of No. 38 may be proved to refer to No. 35 (Hutchins *v.* Scott, 2 M. & W. 816; and see Hitchin *v.* Groom, 5 C. B. 515).

Where the mistake is one of substance, relief may be had in several ways. Thus, a *plaintiff* may recover back money paid under a mistake of fact (see, for a recent case, The Colonial Bank *v.* The Exchange Bank, 11 App. Cas. 84); or apply to set aside the instrument (*Re* Garnet, 31 Ch. D. 1); or may, where the mistake is unilateral, bring an action for rescission, or where the mistake is mutual, for rectification (Paget *v.* Marshall, 28 Ch. D. 255). He may also, it seems, in every case in which the Statute of Frauds is not a bar, and contrary to the former rule, prove mistake in the written contract by parol evidence, and in the same action obtain specific performance of the contract so varied (Olley *v.* Fisher, 34 Ch. D. 367; Fry on Specific Performance, 3rd ed. 374–375). So, the *defendant* may, by way of defence to specific performance, prove by parol a mistake or any other ground of equitable relief (Tay. s. 1140); and in some cases mistake may be relied on as a defence to an action at law, even though the defendant does not counter-claim for rectification (Ros. N. P. 21–22).

"Properly speaking, there is no jurisdiction in any Court to rectify a *will* on the ground of mistake. The Court of Probate may reject words of which the testator is proved to have been ignorant, whether inserted by the fraud or the mistake of the person who prepared the will. But it has no power to remedy a mistake by modifying the language adopted by the testator so as to make it express his supposed intention" (Pollock on Contracts, 5th ed, note on this subject at p. 706). The true view of the supposed cases *contra* appears to be, not that the words are corrected, but that the intention, when clearly ascertained, is carried out, notwithstanding the apparent difficulty caused by the particular words (*id.* p. 707). Parol evidence, however, has been admitted to prove that a will dated in 1855 was, in fact, executed in 1865, and thus revoked another executed in 1858 (Reffell *v.* Reffell, L. R. 1 P. & D. 139); and for recent cases of correction of mistakes in the sense of rejecting words of which the testator was ignorant, see In the goods of Bœhm, 1891, P. 247; In the goods of Gordon, 1892, P. 228; and see fully *infra* as to extrinsic evidence to affect documents.

Want of Due Execution.—As to the requisites of due

execution of documents, see *ante*, p. 361 *et seq.*; and as to *contractual incapacity* in respect of infancy, coverture, lunacy, and drunkenness, see Anson on Contracts, chap. iv.

Consideration.—Want or failure of consideration may, under proper pleadings, always be proved to impeach a written agreement not under seal, even though, as in the case of bills and notes, the words "for value received" are inserted. So words importing a past consideration may be shown by extrinsic evidence to relate to a contemporaneous or future one (Goldshede *v.* Swan, 1 Ex. 154; Morrell *v.* Cowan, 7 Ch. D. 151; Ros. N. P. 20). And though a deed under seal imports a consideration, yet where this fact comes in question it is generally allowable to inquire into it, notwithstanding any averment in the deed (Ros. N. P. 19–21). Thus, where no consideration, or a nominal or good consideration only, is expressed, a valuable one may be proved (Leifchild's Case, L. R. 1 Eq. 231; Townend *v.* Toher, L. R. 1 Ch. 446); or where a valuable consideration is expressed, an additional consideration may be proved (Tull *v.* Parlett, M. & M. 472; Clifford *v.* Turrell, 14 L. J. Ch. 390, 396; Smith *v.* Battams, 26 L. J. Ex. 232). So, where the payment of the consideration is not stated conclusively and unambiguously in the deed, the non-payment thereof may be proved (Lampon *v.* Cooke, 5 B. & Ald. 606); though it is otherwise where the payment is distinctly expressed (*id.*; Rowentree *v.* Jacob, 2 Taunt. 141; Smith *v.* Battams, *supra*; and see Conveyancing Act, 1881, s. 55, as to the effect of receipts contained in, or indorsed on, deeds with regard to subsequent purchasers). Similarly, the consideration expressed in a bill of sale may be shown by extrinsic evidence not to be the true one, so to render the instrument void against trustees in bankruptcy and execution creditors (*Ex parte* Carter, 12 Ch. D. 908; Cochrane *v.* Moore, 25 Q. B. D. 57, 73).

(5) *Extrinsic Evidence to affect Contracts.*—(*a*) *Prior or contemporaneous agreement showing contract, inchoate or conditional.* Evidence may be given of a separate oral agreement constituting a condition precedent to the attaching of any obligation under a contract or instrument (Steph. art. 90). Thus, evidence is admissible that a deed (Ros. N. P. 137) or contract not under seal was delivered merely

as an escrow, and though purporting to take effect forthwith, was only intended to operate upon the happening of certain events, which have not happened (Pym *v.* Campbell, 6 E. & B. 370; Davis *v.* Jones, 17 C. B. 625; Wallis *v.* Littell, 11 C. B. N. S. 674; Rogers *v.* Hadley, 32 L. J. Ex. 241; Clever *v.* Kirkman, 24 W. R. 159). The same doctrine has been applied to show that a duly executed codicil was not intended by the testator to be operative (Lister *v.* Smith, 3 S. & T. 282); and to show whether an ambiguous instrument was executed as a deed poll or a will (In the goods of Slinn, 15 P. D. 156). So, a conveyance, absolute on its face, may be proved by extrinsic evidence to be a mortgage (Barton *v.* Bank of New South Wales, 15 App. Cas. 379); or subject to a resulting trust (Tay. ss. 1017–1018); and though trusts relating to lands, other than resulting trusts, are by section 7 of the Statute of Frauds required to be evidenced in writing, signed by the declarant thereof, yet this section will not apply where the transferee seeks to retain possession of the property by fraud (Haigh *v.* Kaye, L. R. 7 Ch. 469). So, in the case of wills, parol evidence is admissible to prove a secret trust, in order to defeat a fraud, though not otherwise (*Re* Downing, 60 L. T. 140).—(*b*) *Prior or contemporaneous agreement as to omitted or collateral matters.* Evidence may be given of a separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them (Steph. art. 90). The application of this proposition in practice is often a matter of difficulty, and the decisions on the subject are frequently conflicting. The cases to which the proposition applies must be distinguished from those governed by the Statute of Frauds, which requires *all* the terms of the contract to be in writing. Parol evidence, in the former connection, has been received or rejected in the following cases:—

Admissible.	*Inadmissible.*
A. and B. sign a letter specifying the prices to be charged for certain work to be done by	A. insures goods with B., "in ship or ships from Surinam to London"; a concurrent oral

Admissible.	*Inadmissible.*
A. for B;—a contemporaneous oral agreement as to the period of payment, held admissible, as the paper was not a complete contract (Knapp *v.* Harden, 1 Gale, 47). A. hired a horse from B., writing on a card, "six weeks at two guineas, A." B. may prove that A. at the same time orally agreed to be liable for accidents occasioned by the horse shying (Jeffery *v.* Walton, 1 Stark. R. 267; see remarks as to this case by Willes, J., in Malpas *v.* London & S. W. Ry., L. R. 1 C. P. 336, *infra*).	agreement to except a particular ship from the policy (Weston *v.* Emes, 1 Taunt. 115); or to show that the risk was only to begin at an intermediate port (Kaines *v.* Knightly, Skin. 54; Leslie *v.* De la Torre, cited 12 East. 583), is inadmissible.
A. orally agrees with a railway company that they should carry his cattle to K. station for a certain price. He at the same time signs, without noticing its contents, a consignment note for the carriage of the cattle to an *intermediate* station, and does not fill in the price. Held, that both matters could be proved, as they were supplemental to and not contradictory of the document (Malpas *v.* Lond. & S. W. Ry., *supra*).	A. gives B. a promissory note payable on demand;—A. cannot prove a contemporary oral agreement that it should not be paid till a certain event happened (Moseley *v.* Hanford, 10 B. & C. 729; Abrey *v.* Crux, L. R. 5 C. P. 37); or that payment should be hastened or postponed (Hoare *v.* Graham, 3 Camp. 57); or made out of a particular fund (Campbell *v.* Hodgson, Gow, R. 74)
A. takes a lease of land from B., reserving to the latter the sporting rights;—proof may be given of a prior oral agreement, by which B. promised to keep down the rabbits if A. would sign the lease, although the lease itself was silent on the point (Morgan *v.* Griffith, L. R. 6 Ex. 70; Erskine *v.* Adeane, L. R. 8 Ch. 756).	A. takes a lease of a house and furniture from B.;—A. may not prove a prior oral agreement that B. should do the repairs and send in more furniture (Angell *v.* Duke, 32 L. T. 320); or that B. should put the drains right (Burstall *v.* Bianchi, 65 L. T. 678); nor may B. prove a similar agreement for A. to pay the ground-rent to B.'s superior landlord (Preston *v.* Merceau, 2 W. Bl. 1249).
A. and B. agree in writing that A. shall buy the goodwill, furniture, and fixtures of B.'s business;—proof is admissible of a previous oral agreement by B. that in consideration of A. signing the agreement, he (B.) should settle an action then	A. purchases a reversion from B.;—proof of a collateral oral agreement to apportion the rent, held inadmissible (Flinn *v.* Calow, 1 M. & G. 589; see now, Apportionment Act, 1870).

Admissible.	*Inadmissible.*
pending against A. (Lindley *v.* Lacey, 17 C. B. N. S. 578. The agreement in this case contained an authority to B. to settle the action out of the purchase-money).	
A. takes a house from B., the lease containing a covenant that A. shall not use it for trade purposes ;—A. may prove a prior parol agreement by which B. undertook not to let the adjoining houses be used for trade purposes [Martin *v.* Spicer, 34 Ch. D. (C. A.) 1].	
A. buys land at an auction ;—he may prove that the auctioneer, at the time of sale orally represented that there was a certain right of way to the land which was not mentioned in the conditions of sale or the draft conveyance. [Brett *v.* Clowser, 5 C. P. D. 376, *per* Denman, J. ; see Ramsbottom *v.* Tunbridge, and Ramsbottom *v.* Morley, cited *supra*, exception (2).]	A. buys timber at an auction, the conditions of sale describing the number and kind only ;—A. may not prove that the auctioneer at the time of sale orally warranted the timber to be of a certain weight (Powell *v.* Edmunds, 12 East 6 ; Shelton *v.* Livius, 2 C. & J. 411).
	A. agrees in writing to purchase the produce of a certain meadow ;—he may not prove that at the same time it was orally agreed that he should have the produce of a second meadow (Meres *v.* Ansell, 3 Wils. 275).
	A. conveys an estate to B. by deed which states that it consists of particulars specified in a schedule and delineated in a map thereon ;—evidence is not admissible that a close not mentioned in the schedule and map was always occupied and rented as part of the estate, and was intended to be conveyed by the deed (Barton *v.* Dawes, 10 C. B. 261 ; Llewellyn *v.* Jersey, 11 M. & W. 183).
A. signs a written contract with B., there being nothing to show in what capacity he contracts ;—evidence that he was agent for C. is admissible for the purpose not of discharging A.	A. signs a written contract with B., there being nothing in the document to show in what capacity he contracts ;—evidence that to B.'s knowledge A. signed merely as agent for C. is

Admissible.	*Inadmissible.*
but of charging C. (Wilson *v.* Hart, 7 Taunt. 295; Higgins *v.* Senior, 8 M. & W. 834; even though A. disclosed C.'s name at the time, Calder *v.* Dobell, L. R. 6 C. P. 486; and whether the contract is required by the Statute of Frauds to be in writing or not, Tay. s. 1153). A. signs a sold note thus: "Sold to our principals";—evidence is admissible to show who the principals are (Cropper *v.* Cook, L. R. 3 C. P. 194); and to personally charge A. as one (Carr *v.* Jackson, 7 Ex. 382). A deed between A. and B. stated, "it is further understood between the parties that C. guarantees the payments due from A. to B. hereunder";—the deed was executed for A. by C. under a power of attorney thus: "P. R. A.—A.—C."—Evidence of statements by C. at the time of signing, that he intended to sign for himself as well as for A. held admissible (Young *v.* Schuler, 11 Q. B. D. 651, C. A.) A. and B. sign a joint promissory note in favour of C.;—evidence is admissible that B. was, to C.'s knowledge, a surety merely, and that C. had given time to A. and thus discharged B. (Greenough *v.* M'Clelland, 30 L. J. Q. B. 15; Overend, &c. *v.* Oriental Financial Corporation, L. R. 7 H. L. 348. These cases must be considered as exceptional, see Tay. s. 1153, citing further decisions to the same effect).	inadmissible (Higgins *v.* Senior, *supra*); so where A. signed, and was designated in, a charter-party as "shipowner," evidence was rejected that C. was the shipowner, and A. merely his agent (Humble *v.* Hunter, 12 Q. B. 310).

(*c*) *Usage to annex unexpressed terms.*—Usage is, as we have seen, admissible to *annex* unexpressed incidents to oral or written contracts, provided such incidents are not inconsistent with those which are expressed (*ante*, p. 47. As to the admissibility of usage to *explain* contracts; see *infra*, p. 409).

(*d*) *Subsequent agreement to modify or rescind.*—After an

agreement has been reduced into writing it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to annul the former agreement; or in any manner to add to, subtract from, vary, or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will thus be left of the written agreement [Goss *v.* Lord Nugent, 2 B. & Ad. 58, 65, *per* Lord Denman; Tay. ss. 1141–1146; Ros. N. P. 29; Steph. art. 90].—Even a contract by deed may be discharged, though not released, by parol (Cort *v.* Ambergate, &c., Co., 17 Q. B. 127, 145; *Ex parte* Morgan *in re* Simpson, 2 Ch. D. 72, at pp. 89, 93; Williams *v.* Stern, 5 Q. B. D. 409); but a contract required by the Statute of Frauds to be in writing though it may be wholly discharged by a valid oral agreement (Goss *v.* Nugent, 5 B. & Ad. 66; Noble *v.* Ward, L. R. 1 Ex. 117; see, however, Harvey *v.* Grabham, 5 A. & E. 61, 74; Tay. s. 1143), cannot be partially abandoned (Goss *v.* Nugent, *supra*) or varied (Stowell *v.* Robinson, 3 Bing. N. C. 928; Marshall *v.* Lynn, 6 M. & W. 109; Stead *v.* Dawber, 10 A. & E. 57; Sanderson *v.* Graves, L. R. 10 Ex. 234) in this manner.

As to the discharge of bills and notes, see Bills of Exchange Act, 1882, ss. 62, 89; and as to the revocation of Wills, see Wills Act, 1837, ss. 19, 20.

ADMISSIBLE TO EXPLAIN.—Whenever the meaning of the words of a document, or their application to the facts of the case, is doubtful, extrinsic evidence is admissible to enable the Court to interpret and construe the document. And when any presumption arises against the apparent intention of a document, similar evidence is receivable to rebut, or (in answer to such evidence only) to support such presumption.

Ambiguity, Patent and Latent.—Ambiguities are commonly said to be either patent or latent. The former arises where the instrument on its face is unintelligible, as where the name of a legatee is left wholly blank; in which case no evidence may be given to fill up the blank. The latter arises where the words of the instrument are clear, but their application to the circumstances is doubtful; as where a legacy is given to "my niece Jane," and the testator has

two nieces of that name; here the ambiguity being raised solely by extrinsic evidence, is allowed to be removed by the same means.

The above distinction, which was originally taken by Lord Bacon with reference to pleading upon instruments under seal, cannot be relied on as a test of the admissibility of evidence in the present connection; for though it is commonly said that parol evidence may not be given to explain a patent ambiguity (*e.g.*, Ros. N. P. 32), this is not invariably correct. In the case above stated of a total blank in a will, the proposition is true; but it is otherwise with partial blanks (In the goods of Rosaz, 2 P. D. 66), or where a legatee is merely referred to by a term of endearment (Sullivan *v.* Sullivan, I. R. 4 Eq. 457), though in both cases the ambiguity is patent. So the description of a legatee by an initial creates a patent ambiguity, but it does not exclude extrinsic evidence other than declarations of intention by the testator (*id.*; Abbott *v.* Massie, 3 Ves. 148; Clayton *v.* Nugent, 13 M. & W. 200; Steph. art. 91, illustr. *e.*). And where a document which began "I, A. B.," was signed "C. D.," the ambiguity apparent on the face of the writing was allowed to be explained by parol (Summers *v.* Moorehouse, 13 Q. B. D. 388). The rule is sometimes stated merely that "when the ambiguity is *patent*, all declarations of the writer's intention will be uniformly excluded" (Tay. s. 1213; Sullivan *v.* Sullivan, *supra*); but since such declarations are also, with a single exception, uniformly excluded in all cases of *latent* ambiguity, the statement does not assist.—An *inaccuracy* must, it is scarcely necessary to say, be distinguished from an *ambiguity*; language may be inaccurate without being ambiguous—*e.g.*, where a testator having only one house, a leasehold, devises it as "his freehold house"; or it may be ambiguous without being inaccurate—*e.g.*, where, as in the case above stated, he gives a legacy to his niece Jane, and it appears that he has two nieces of that name.

Principle.—The principle of the present rule is, that as all documents refer expressly or tacitly to the circumstances under which they were written, the Court should, with regard to these circumstances, be placed as nearly in the situation of the writer as possible in order to determine what he meant by the language employed (Wigram, Extr. Ev. 92; Greenleaf, s. 295; see Charter *v.* Charter, L. R. 7

H. L. 364). The inquiry, however, being not what the writer intended to say, but what the meaning is of that which he has said, *non quod voluit sed quod dixit*, it follows that his declarations of intention cannot in general be received; in addition to which their admission would tend to substitute oral for written evidence and so violate the opening rule of this chapter. It will thus be seen that the duty of the Court with respect to extrinsic evidence is one of interpretation and construction merely, and never one of formation or revision.

[Tay. ss. 1158–1231; Ros. N. P. 29–33; Powell, 447–466; Steph. art. 91; Wigram on Extrinsic Evidence.]

Five Classes of Extrinsic Evidence Admissible.—For the purposes of the rule five kinds of evidence may be given:—(1) General evidence of *surrounding circumstances* (*post*, 410). (2) *The testimony both of experts and non-experts*, as to the meaning, but not as to the construction, of the language (*ante*, pp. 257, 259, 270). (3) *Usage*, to explain technical terms (*infra*, examples *a*); to construe the document (Dashwood *v.* Magniac, 1891, 3 Ch. 306); or to annex unexpressed incidents thereto (*ante*, pp. 47, 405); and which, when so admissible becomes as much a part of the document as if contained therein, so that a mere oral agreement to exclude it cannot be proved (Fawkes *v.* Lamb, 31 L. J. Q. B. 98). Such evidence, however, is not receivable where it is expressly excluded by, or is inconsistent with, the terms of the document; nor where its effect would be to vary the statutory meaning of words. [See further *ante*, 47, 48; Tay. ss. 1160–1193; Ros. N. P. 22–29; Smith, L. C. 9th ed. vol. i. pp. 577–603; vol. ii. pp. 423–440.] Under this head is generally placed the rule that in order to explain, but not to contradict, ancient documents whose meaning is doubtful, *the acts of the author*, but not his declarations, in relation to the subject of the instrument; or the *mode in which property has been held and enjoyed* thereunder; or even constant modern usage, may be given in evidence (Tay. ss. 1204–1205). (4) *Course of dealing between the parties.* When the meaning of a document is doubtful (Bourne *v.* Gatcliffe, 11 C. & F. 45; Harrison *v.* Barton, 30 L. J. Ch. 213; Forbes *v.* Watt, L. R. 2 Sc. & D. 214; Royal Ex. Ass. Corp. *v.* Tod, 8 Times L. R. 669; Tay. s. 1198), but not when it is clear (Marshall *v.* Berridge, 19 Ch. D. 233; Iggulden *v.*

May, 9 Ves. 333), the sense in which both, but not one only, of the parties have acted on it is admissible in explanation. (5) *The writer's habits of speech.* Where the writer has been in the habit of nicknaming or misnaming persons or things, and these names appear in a document, evidence of such habitual use of language may be given to explain the document, in the same way as if it was written in cypher or a foreign language (Doe *v.* Hiscocks, 5 M. & W. 368; Abbott *v.* Massie, 3 Ves. 148; Lee *v.* Pain, 4 Hare 251; In the goods of Rosaz, 2 P. D. 66; Tay. ss. 1210, 1211; see, however, Millard *v.* Bailey, L. R. 1 Eq. 382).

Declarations of Intention.—There is one class of extrinsic evidence which, for reasons stated *supra*, is not generally receivable under the above rule—*i.e.*, declarations of intention by the author of the document. Such evidence is, however, admitted by exception in the following cases:—(1) Where the words used raise that particular species of latent ambiguity known as "equivocation"—*i.e.*, when they are equally applicable to two or more subjects; (2) to rebut a presumption (see *infra*, p. 412). (3) They are also, as we have seen, admissible to show what documents constitute a will; (4) to prove the contents of a lost will; and (5) to support or impeach the will in cases of fraud or forgery (*ante*, pp. 209–212; the other cases there mentioned will be found to fall under one or other of these headings).

Meaning of Words.[a]—Extrinsic evidence is always admissible to explain the meaning of technical, local, or provincial terms, or of words written in cypher, or abbreviated, or scarcely legible; as well as to translate, and where necessary to supply the technical equivalent of foreign expressions. (Chatenay *v.* Brazilian, &c., Co., 1891, 1 Q. B. 79; *ante*, p. 259). So, where the language employed has a double meaning, the primary one common, and the secondary one technical, local, or peculiar, evidence to explain the latter may be given, *provided* it is first shown, either from the context or from extrinsic circumstances, that the secondary and not the primary sense was the one intended (Holt *v.* Collier, 16 Ch. D. 718; *ante*, pp. 259, 270).

Application of Documents to Facts.[b]—The object being, as we have seen, to place the Court as nearly as possible in the position of the author of the document,

it follows that all *surrounding circumstances* which will enable it to identify the persons or things to which the writing refers, or to ascertain the nature and qualities of the subject-matter of the instrument, may be given in evidence (Charter *v.* Charter, L. R. 7 H. L. 364; Cloak *v.* Hammond, 34 Ch. D. 255).

Thus, to construe a devise, all facts known to the testator as to his family and affairs; or as to the subject of the devise—*e.g.*, as to its possession, acquisition, local situation, distribution, value or encumbrances, fall within the rule (Doe *v.* Martin, 4 B. & Ad. 785; Nightingall *v.* Smith, 1 Ex. 879; Allgood *v.* Blake, L. R. 8 Ex. 160). So, to connect several writings, and show whether they constitute a will (*ante*, p. 209) or contract, extrinsic evidence is admissible; provided that in cases under the Statute of Frauds some intrinsic connection appears from the documents themselves (Long *v.* Miller, 4 C. P. D. 450; Oliver *v.* Hunting, 44 Ch. D. 205). To show the name of a party to a contract under the statute, even the mere physical connection between a letter and its envelope has been held sufficient (Freeman *v.* Freeman, 7 T. L. R. 431).

The circumstances proved must, however, be within the writer's personal knowledge, or the common knowledge of those in his own business or community, or at least notorious to all the world, for matters which he was not likely to be acquainted with or had never heard of, cannot be proved in explanation of the instrument (Adie *v.* Clark, 3 Ch. D. 134, reversed, 2 App. Cas. 435, as to the particular documents there rejected).

It may be remarked that extrinsic evidence is often necessary apart from the question of ambiguity, as where a legacy is left by a testator to his niece Jane, and it is necessary to inquire simply whether he has a niece of that name, or whether she is dead. This is not, however, what is ordinarily meant by extrinsic evidence; other evidence beyond this is only admissible where there is an ambiguity or inaccuracy to be explained (Tottenham *v.* Ely, 65 L. T. 452).

The following rules embrace the chief cases of ambiguity or inaccuracy ordinarily arising in practice:

(1) *Where there is one subject-matter only which fully answers a description*, further extrinsic evidence is not admissible to show that such subject-matter was not

intended, or that some other was (Sherratt *v.* Mountford, L. R. 8 Ch. 928; Tottenham *v.* Ely, *supra*), unless such subject-matter was unknown to the author (Doe *v.* Beynon, 12 A. & E. 431; Grant *v.* Grant, L. R. 5 C. P. 727), or the context shows it could not have been intended (Charter *v.* Charter, L. R. 7 H. L. 364; *In re* Wolverton, 7 Ch. D. 197).

(2) *Where a description is partly correct and partly incorrect*, and the former part is sufficient to identify the subject intended, while the latter does not apply to any subject, the erroneous part will be rejected on the maxim *falsa demonstratio non nocet cum de corpore constat* (Tay. ss. 1218–1223); unless it is introduced by way of exception or limitation (Tay. s. 1224).

The evidence is confined, however, to showing how the mistake arose, and cannot be received to show that the author intended something different from what he has said (Selwood *v.* Mildmay, 3 Ves. 306; Lindgren *v.* Lindgren, 9 Beav. 358).

Under this heading may be noticed the somewhat arbitrary rule that where a testamentary gift to children describes them as consisting of a less number than exists at the date of the will, and the Court fails to discover from the context or extrinsic circumstances which of the children are meant, it will reject the specified number on the presumption of mistake, and all the children will take (Newman *v.* Piercey, 4 Ch. D. 41).

(3) *Where a description applies equally to several different subjects*, an equivocation arises and extrinsic evidence (including declarations of intention by the author) is admissible to identify the subject intended (Doe *v.* Hiscocks, 5 M. & W. 363; Charter *v.* Charter, *supra*); *provided* that such subject cannot be identified from the instrument itself (Doe *v.* Westlake, 4 B. & Ald. 57; Healy *v.* Healy, I. R. 9 Eq. 418; Webber *v.* Corbett, L. R. 16 Eq. 515).

This proposition has been held to apply to the case of two persons bearing the same name as that mentioned in the document, although one has also additional names not mentioned therein (Bennett *v.* Marshall, 2 K. & J. 740; Webber *v.* Corbett, L. R. 16 Eq. 515; *In re* Wolverton, 7 Ch. D. 197).

(4) *Where part of a description applies to one subject-matter and part to another*, extrinsic evidence is admissible to ascertain to which the language applies.

It is doubtful whether the old rule that the name in such cases is to prevail over the description, would be strictly followed now; the modern inclination being to decide the point purely by preponderance of probability (Tay. s. 1215; Cloak *v.* Hammond, 34 Ch. D. 255).

(5) *Where the language of a document is meaningless in its primary signification*, extrinsic evidence may be given of a secondary sense which gives effect to the document (Doe *v.* Hiscocks, *supra*; Wigram, Extr. Ev. 11; *ante*, p. 408).

(9) *Where the language of a document, although aided by extrinsic evidence, is insufficient* to determine the subject-matter intended, the document will be void for uncertainty.

Rebutting Presumptions.[c]—Where a presumption arises against the apparent intention of a document, extrinsic evidence (including declarations of intention by the author) is admissible to rebut, or, in answer to such rebutting evidence only, to support the presumption (*In re* Tussaud, 9 Ch. D. 363).

Similar evidence and declarations are admissible to rebut the presumption that a will, proved to have been in the custody of the testator and not forthcoming at his death, has been destroyed *animo revocandi* (*ante*, p. 209); or that alterations &c., appearing on the face of the will, have been made subsequently to its execution (*ante*, pp. 210, 307).

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) The question being whether a legacy of a sculptor's "mod tools for carving" meant modelling tools for carving or moulds, or models;—the opinion of statuaries is admissible to prove that there were no such tools known as modelling tools for carving, and that the word "mod" would be understood by a sculptor as an abbreviation for models (Goblet *v.* Beechey, 3 Sim. 24; 2 Rus. & Myl. 624).	(*a*) The question being as to what lands acquired by a railway company were "delineated" upon statutory plans; — the opinions of engineers on the point are not admissible, the word being intelligible to ordinary readers (Dowling *v.* Pontypool &c., Co., L. R. 18 Eq. 714).
Evidence of *usage* has been held admissible to explain the following matters:—That the word "year" in a theatrical contract meant those parts of the	Evidence of usage has been held inadmissible to explain the following matters:—That words of weight, measure, or number, having a statutory meaning

Admissible.

year during which the theatre was open (Grant *v.* Maddox, 15 M. & W. 737); that "months" in a charter-party meant calendar and not lunar months (Jolly *v.* Young, 1 Esp. 186; Simpson *v.* Margitson, 11 Q. B. 32); that "October," in a certain contract of marine insurance, meant from the 25th to the 31st of that month (Chaurand *v.* Angerstein, Peake R. 43). So the time when lay-days commence (Norden Steamship Co. *v.* Dempsey, 1 C. P. D. 654); or the mode of calculating running days (Nielsen *v.* Wait, 16 Q. B. D. 67) may be similarly proved; and usage is admissible to show that in a lease of a rabbit warren the word "thousand" meant in that particular part of the country twelve hundred (Smith *v.* Wilson, 3 B. & Ad. 728); or that "18 pockets of Kent hops at 100*s.*" meant at 100*s.* per cwt. (Spicer *v.* Cooper, 1 Q. B. 424); that a "full and complete cargo of sugar" meant full and complete according to the customary mode of packing and loading sugar at the particular port (Cuthbert *v.* Cumming, 11 Ex. 405); that "Liverpool merchandise" meant such as was ordinarily shipped therefrom, and not ordnance stores (Vandespar *v.* Duncan, W. N. 1891, 178); that "warranted no St. Lawrence" included, in a contract of marine insurance, both the gulf and river of that name (Birrell *v.* Dryer, 9 App. Cas. 345; and see Uhde *v.* Walters, 3 Camp. 16; Robertson *v.* Money, Ry. & M. 75). So "regular terms of loading" (Leidemann *v.* Schultz, 14 C. B. 318); and "in turn to deliver" (Robertson *v.* Jackson, 2 C. B. 412) may be similarly explained.

Inadmissible.

attached to them, were not used in that meaning (Smith *v.* Wilson, 3 B. & Ad. 731–734; O'Donnell *v.* O'Donnell, 13 L. R. I. 226; the statutory meaning may, however, be excluded by the express terms of the document, Tay, s. 1165); that the word "beerhouse" includes a grocer's shop in which beer is sold (Holt *v.* Collier, 16 Ch. D. 718. Here the contract contained nothing pointing to a peculiar use of the words, and was not made between two persons in the trade; *aliter* if it had been).

A custom in a particular trade to use a word in a peculiar sense, though admissible to explain a contract between two traders, is not admissible to explain a contract between them and their apprentices (Abbott *v.* Bates, 30 L. T. 99).

Admissible.	*Inadmissible.*
To explain an ancient bequest to "godly preachers of Christ's Holy Gospel";—evidence that the testatrix was a member of a sect of Protestant Trinitarian Dissenters who applied the former description to themselves is admissible (Shore *v.* Wilson, 9 C. & F. 355, 580).	
Usage has also been admitted to show that in the building trade "weekly accounts" meant accounts of day-work only, and not of measured work (Myers *v.* Sarl, 30 L. J. Q. B. 9); and that the liability of an underwriter for "general average" did not include the jettison of goods stowed on deck (Miller *v.* Tetherington, 6 H. & N. 278; 7 H. & N. 954).	Usage has been rejected to show that where, under a written contract, goods were to be paid for "by bills," this meant approved bills, and gave the vendor an option of rejecting bills of which he disapproved (Hodgson *v.* Davies, 2 Camp. 532; approved in Trueman *v.* Loder, 11 A. & E. 599); or that the word "boats" in a policy of marine insurance did not include boats slung outside the ship (Blackett *v.* Roy. Ex. Ass. Co., 2 C. & J. 244).
A contract to deliver "50 tons best palm oil, with fair allowance for inferior, if any," may be explained to be satisfied by the delivery of 50 tons, of which the greater part was inferior (Lucas *v.* Bristow, 27 L. J. Q. B. 364).	On a warranty of "prime singed bacon," evidence of a practice in the trade to receive bacon slightly tainted as prime singed is inadmissible (Yates *v.* Pym, 6 Taunt. 446; and see Malcolmson *v.* Morton, 11 Ir. Law R. 230).
The question being as to the meaning of "Pacific ports" in a policy of insurance;—evidence that the course of dealing between the parties in similar contracts was to treat the words as confined to ports on the west coast of the Pacific, is admissible (Roy. Ex. Ass. Co. *v.* Tod, 8 Times L. R. 669). So where a joint proposal had been made by A. and B. to buy property, evidence of their subsequent acts was admitted to show that they intended to take as tenants in common and not as joint tenants (Harrison *v.* Barton, 30 L. J. Ch. 213).	A. lets land to B. for 21 years by a lease containing a covenant that at the expiration of the term A. would grant a new lease for the same term with "all covenants, grants, and articles, as in the original lease contained";—evidence of a usage between the parties and their predecessors to continually renew is not admissible to construe the covenant (Igguldon *v.* May, 9 Ves. 325). Nor is the construction put upon the agreement by one party alone admissible (McLean *v.* Kennard, 9 Ch. 336; except against him as an estoppel, Marshall *v.* Berridge, 19 Ch. D. 233; Gandy *v.* Gandy, 30
Under a bequest of the "several sums of i. x. x. and o. x. x.,"	

Admissible.	*Inadmissible.*
evidence is admissible that the testator had been a jeweller and had *habitually used* those symbols to represent £100 and £200 respectively (Kell *v.* Charmer, 23 Beav. 195).	Ch. D. 57; Roe *v.* Mutual Loan Fund, 19 Q. B. D. 347).
A testator leases a legacy to "Mrs. G."—Evidence is admissible that he was in the habit of calling a Mrs. Gregg "Mrs. G." (Abbott *v.* Massie, 3 Ves. 148). So under a bequest to the "second son of Edmund Weld of Lulworth," evidence may be given that the testator constantly called Joseph Weld of Ludworth "Edmund" by mistake, even though he had frequently been corrected for doing so (Blundell *v.* Gladstone, 11 Sim. 467); and see Lee *v.* Pain, 4 Hare 251, for a case in which the testator had constantly, even after correction, called a Mrs. Westbourne, who was the daughter of a Mr. Bowden, "Mrs. Bowden." So, where a legacy to Catherine Earnley was claimed by Gertrude Yardley, evidence was admitted that there was no such person as the former, but that the testator usually called the latter "Gatty," which might have been mistaken by the scrivener for Katy, *i.e.*, Catherine (Beaumont *v.* Fell, 2 P. Wms. 141; there was other corroborative evidence besides the above, including declarations of intention by the testator, though these would not now be admitted on the same facts, Tay. s. 1211, note to this case).	Under a bequest to the testator's "heir," evidence that the testator was in the habit of so calling a person who was not his heir, is inadmissible (Mounsey *v.* Blamire, 4 Russ. 384; the ground being that where a word has acquired a precise and technical meaning no other can be applied). See also Millard *v.* Bailey, L. R. 1 Eq. 382, where evidence of a testator's habit of calling certain shares "double shares," was rejected in explanation of a will.
(*b*) *Rule I.*—A testator appointed his "nephew George Ashton" to be his executor. He had both a legitimate and an illegitimate nephew of that name. Held, as he had in other parts of his will spoken of his legitimate and illegitimate rela-	(*b*) *Rule I.*—A testator leaves a legacy to "his children," having at the date of the will both legitimate and illegitimate children. The former alone take, and extrinsic evidence to show he intended the latter is inadmissible (Ellis *v.* Houston, 10 Ch. D. 236).

Admissible.	*Inadmissible.*
tions indiscriminately as his "relations," parol evidence was admissible to show that the illegitimate nephew was intended (In the goods of Ashton, 1892, P. 83; following Seale-Hayne *v.* Jodrell, 1891, A. C. 304. *Aliter* if he had not so used the word in the will itself).	A testator leaves a legacy to his "cousin A. R. C. Loftus," who at the date of the execution of the will was dead. Evidence that by a mistake of the draftsman the above name was inserted instead of George Loftus, held not admissible, there being no ambiguity (Tottenham *v.* Ely, 65 L. T. 452; and see Miller *v.* Travers, 8 Bing. 244). A testator bequeaths to B. all debts due from the latter to the former. B. owes the testator a personal debt and a joint debt. The former only passes under the bequest (*Ex parte* Kirk, *In re* Bennett, 5 Ch. D. 800; *aliter* perhaps if the joint debt had been the only one existing).
Rule II.—A testator having devised "all his freehold houses in Aldersgate Street;"—evidence was admitted that he had only leasehold houses there, which were consequently held to pass under the will (Day *v.* Trig, 1 P. Wms. 286).	
A. appoints as his executor "Percival —— of Brighton, Esq., the father."—Extrinsic evidence is admissible to explain who is meant thereby (In the goods of Rosaz, 2 P. D. 66). So, where the surname was given but the Christian name omitted (Price *v.* Page, 4 Ves. 680); as also where the devise was to "Mrs. G." simply (Abbott *v.* Massie, 3 Ves. 48). See further, *In re* Harrison, Turner *v.* Hellard, 30 Ch. D. 390; *In re* Bacon, Camp *v.* Coe, 31 Ch. D. 460, *infra* examples *c.*	A. leaves a legacy to "Mr. ——," and another to "Lady ——;" extrinsic evidence is not admissible to fill up the blanks (In the goods of Rosaz, *supra*, and cases cited). So, where the devisees were indicated by single letters only having no reference to their names, a card kept by the testator separate from the will and containing a key to the persons meant, was held inadmissible to explain the will (Clayton *v.* Nugent, 13 M. & W. 200; *aliter* if the testator was proved to have habitually called particular persons by those names; or perhaps, if the card had been referred to in the will). See also Sullivan *v.* Sullivan, I. R. 4 Eq. 457, where mere general extrinsic evidence

Admissible.

Rule III.—A testator having devised one of his houses to "George Gord the son of George Gord"; another to "George Gord the son of John Gord"; and a third to "George Gord the son of Gord;"—extrinsic evidence (including declarations of intention and instructions given for his will by the testator) held admissible to show that the third house was intended to go to the first-named devisee (Doe *v.* Needs, 2 M. & W. 129). So, where under a devise to "William Marshall, my second cousin," it appeared that the testator had no second cousin of that name, but had two first cousins once removed, one called William Marshall, and the other William J. R. B. Marshall, similar evidence was admitted to remove the doubt (Bennett *v.* Marshall, 2 K. & J. 740).

A testator leaves a legacy to the children of his daughter "other than by Mr. Thomas Fisher of Bridge Street, Bath," —extrinsic evidence was held admissible to show that at the date of the will the testator's daughter was unmarried, and was being courted by Henry Tom Fisher, son of Thomas Fisher of Bridge Street, at whose house he lived; that the testator strongly disapproved of the younger Fisher, who was known to him only as Tom Fisher; and was aware that Thomas Fisher, the father, was a married man with a wife living. The testator's daughter having subsequently married Henry Tom Fisher, her children were held not entitled to the legacy (*In Re* Wolverton, 7 Ch. D. 197).

Rule IV.—A testatrix left a

Inadmissible.

was rejected to show who "my dearly beloved" meant.

Rule III.—A testator having left a legacy to his "niece Laura, second daughter of my brother J. H. Webber"; another to his "niece Laura"; and the residue to "Laura Webber," and it appearing that he had another niece called Laura F. T. Webber, —extrinsic evidence in favour of the latter was rejected on the ground that the intention was clear from the will itself and that no equivocation arose (Webber *v.* Corbett, L. R. 16 Eq. 515; Doe *v.* Westlake, 4 B. & Ald. 57; Healy *v.* Healy, I. R. 9 Eq. 418).

Admissible.	*Inadmissible.*
legacy to "my cousin Harriet Cloak." She had at the date of the will no cousin strictly answering that name, but had (1) a cousin, whose name had been Harriet Cloak, but who had since married and become Harriet Crane; and (2) a cousin's wife whose name was Harriet Cloak;—held, extrinsic evidence (but not declarations of intention) admissible to show that the latter was the person meant (Cloak *v.* Hammond, 34 Ch. D. 225).	
Rule V.—A. leaves a legacy to "the children of B. now living," —although this primarily imports legitimate children, extrinsic evidence may be given to show that the only children of B. living were illegitimate, in which case they will take the legacy (Dover *v.* Alexander, 2 Hare, 282; so where the gift is to the children of a deceased person who had only illegitimate children, Edmunds *v.* Fessey, 29 Beav. 233).	*Rule V.* — A. by his will leaves a legacy to B. of "some of his household linen, and a handsome gratuity,"—the gift is void for uncertainty, and no extrinsic evidence is admissible to explain it (Peck *v.* Halsey, 2 P. Wms. 387; Jubber *v.* Jubber, 9 Sim. 503; and see *supra* as to a total blank in a will).
(*c*) A testator having made a settlement upon his daughter at her marriage, subsequently leaves her a legacy by his will. To rebut the presumption against double portions, declarations by the testator that he intended the legacy to be in addition to, and not in satisfaction of, the provisions in the settlement are admissible (*In re* Tussaud, 9 Ch. D. 363, C. A.).	A. lodges certain securities at a bank in the joint name of himself and his daughter. After his death a memorandum dated fifteen months subsequently to the deposit is found, in which he directs the securities to be applied for other purposes. This memorandum is not admissible to rebut the presumption that the money is a gift (O'Brien *v.* Sheil, Ir. R. 7 Eq. 255; Williams *v.* Williams, 32 Beav. 370; *aliter* if the declarations had been made contemporaneously with the deposit, since the question is what the intention was at the time of the transaction and not what it was subsequently).
Where the words of a will were, "I give and bequeath the residue of my property unto ——, and I appoint A. to be my executor," evidence of declarations by the testator that A. should take the property, held admissible, not to supply the blank, but to rebut the presumption arising therefrom against the *prima facie*	

Admissible.	*Inadmissible.*
title of the executor to the undisposed of residue (*In re* Bacon, Camp *v.* Coe, 31 Ch. D. 460).	
A. appoints B. executor of his will, B. at the time owing A. a debt. Though at law the debt is discharged, in equity it continues, and in order to rebut the presumption that the testator did not intend to forgive the debt, his declarations showing that he did intend *during his lifetime* to forgive it are admissible (Strong *v.* Bird, L. R. 18 Eq. 315; *In re* Applebee, Leveson *v.* Beales, 1891, 3 Ch. 422; *aliter* if the declarations had merely manifested an intention to forgive the debt *by will*, for that would have been to make a parol will).	

BOOK III.

EFFECT OF EVIDENCE.

CHAPTER XLVI.

PRESUMPTIONS AND ESTOPPELS.

PRESUMPTIONS.—Presumptions are, as we have seen, either of law or fact, and when of law may be either conclusive, *præsumptiones juris et de jure*, or rebuttable, *præsumptiones juris*, but when of fact, *præsumptiones hominis*, are always rebuttable (*ante*, p. 2). Mixed presumptions are those which are partly of law and partly of fact.

When there are conflicting presumptions the case must be determined on the evidence adduced (R. *v.* Wiltshire, 6 Q. B. D. 366).

[Tay. ss. 70–216; Ros. N. P. 33–44; Ros. Cr. Ev. 14–23; Powell, 70–110; Steph. arts. 85–89; 98–101; Best, ss. 296–471, and see notes to first-mentioned section in Chamberlayne's Am. ed.; Whart. ss. 1226–1365; Greenleaf, 14th ed. ss. 14–48, and editor's notes to last of these sections.]

Conclusive Presumptions of Law.—The modern tendency of courts being to contract the range of all arbitrary rules affecting the weight of evidence, and to leave questions of fact to be determined as far as possible by the probabilities of the particular case, many presumptions of law, which in early times were considered absolute and indisputable, have since been relegated to the category either of rebuttable presumptions of law, or of mere presumptions or inferences of fact (Best, s. 307). Indeed, Dr. Wharton goes so far as to say that while the *juris et de jure* class is still said to exist, no

perfect individual of the class is to be found (s. 1234). In many cases these so-called conclusive presumptions are rules which belong, properly speaking, to the various branches of substantive law and not to the law of evidence. Thus, the presumption that an infant under seven is incapable of committing a felony, or that all men know the law (*i.e.*, that ignorance of law is no excuse for crime), belong to the criminal law.

Mr. Taylor gives the following instances, amongst many others, of matters which are conclusively presumed, or amount to conclusive evidence, either by statute or common law :—

The validity of any composition or general scheme of arrangement, when certified by the official receiver in bankruptcy (Bankruptcy Act, 1883, s. 18, sub-s. 9); the validity of the valuation list for the time being in force under the Valuation Metropolis Act, 1869, s. 45; the payment of simple contract debts after the expiration of six years (Statute of Limitations, 21 Jac. 1, c. 16; the statute has, however, been held not to discharge the debt, but merely to bar the remedy). The proposition that every sane person intends the probable consequences of his acts (Mr. Best regards this merely as a *præsumptio juris*, s. 305); that judicial records are correct (see *ante*, pp. 276, 395, 399); that bonds and other specialities, in the absence of fraud, were given for good consideration (see *ante*, p. 401); and that ancient documents were duly executed (see *ante*, pp. 369–370).

Rebuttable Presumptions of Law.—Disputable presumptions of law differ from presumptions of fact in the following respects :—(1) Presumptions of law derive their force from *law;* while presumptions of fact derive their force from *logic.* And though many of the former have intrinsic logical weight, being indeed derived from the latter, yet there are others which have none. Thus it is difficult to see what inherent probability there is that a prisoner who has been committed for trial is innocent. (2) A presumption of law applies to a *class*, the conditions of which are fixed and uniform; a presumption of fact applies to *individual cases*, the conditions of which are inconstant and fluctuating. Thus, the presumption of death arises whenever seven years' unexplained absence is proved; but when it is necessary to establish the death at any precise period within the seven years the question must be decided on the evidence adduced in each specific case (see *infra*).

(3) Presumptions of law are drawn by the *Court* and in the absence of opposing evidence are conclusive for the party in whose favour they operate; presumptions of fact are drawn by the *jury*, who may disregard them however cogent. [Greenleaf, note to s. 48, 14th ed.; Whart. s. 1137; Best, s. 304; Tay. s. 111.]

In practice, however, these distinctions are by no means easy to apply; and the line of demarcation, even when visible, is often overlooked. A presumption which is regarded by some judges and text-writers as one of law, is treated by others as one of fact; nay, the same judges not unfrequently at different times place the same presumption in different categories (Tay. s. 111).

The chief function of a rebuttable presumption of law is to determine upon whom the burden of proof rests, using that term in the sense of introducing evidence (*ante*, p. 15).

The following are some of the chief presumptions usually included under this head:—

Legitimacy.—It is a rebuttable presumption of law that a child, born during lawful wedlock, is legitimate; and this presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities (Bosvile *v.* A.-G., 12 P. D. 177; Burnaby *v.* Baillie, 42 Ch. D. 282; Hawes *v.* Draeger, 23 Ch. D. 173).

Proof that access between husband and wife at the necessary time was impossible, or highly improbable, will suffice to rebut the presumption (*id.*); and with the same object not only the conduct of the parties, but the family treatment and reputation on the subject are also admissible (*ante*, pp. 53, 199, 255). The direct testimony and declarations of the parents, however, cannot, as we have seen, be received; unless indeed such declarations be tendered merely as a part of their general conduct and not as evidence of the facts stated (*ante*, p. 97).

If there is no proof that the child of a married woman was born *during* the marriage, no presumption of legitimacy will, it seems, arise (Robinson *v.* Buccleuch, S. J. vol. xxxi. p. 329, *per* C. A.); and if the child is proved to have been born more than nine months after the husband and wife have been judicially separated, it will be presumed to be illegitimate (Hetherington *v.* Hetherington, 12 P. D. 112).

Marriage.—A *primâ facie* presumption of an equally

strong character is, except in cases of bigamy or petitions for damages for adultery, made by law in favour of the validity of a marriage proved to have been celebrated *de facto* (Piers *v.* Piers, 2 H. L. C. 331; Sastry Veleider *v.* Sembecutty, 6 App. Cas. 364). And persons living together ostensibly as man and wife will, on grounds of morality and decency, be presumed to be such, unless the contrary is clearly proved (*id.*; Doe *v.* Fleming, 4 Bing. 266; Collins *v.* Bishop, 48 L. J. Ch. 31; *ante*, p. 50).

Death.—A person who has not been heard of for *seven years* by those who, if he had been alive, would be likely to have heard of him, is presumed to be dead; but there is no presumption as to the time during the seven years at which he died (*In re* Phenè's Trusts, 5 Ch. App. 139; *In re* Lewes's Trusts, 6 Ch. App. 357; *In re* Rhodes, 36 Ch. D. 586; R. *v.* Lumley, L. R. 1 C. C. R. 196; and see a series of articles on this presumption in the S. J. Feb. 15, 1890, *et seq.*).

It has been said that there is a further presumption to the effect that an unmarried man who has not been heard of for seven years will be presumed to have died without issue (see Powell, 6th ed. 106, citing Seton on Decrees, 2nd ed. 975, and *Re* Harding, Times, May 28th, 1891; *contrà*, Greaves *v.* Greenwood, 2 Ex. D. 289).

There is no presumption of law as to priority of death where two or more persons have perished in the same catastrophe; the question being purely one of evidence (*ante*, p. 53).

Innocence.—In the absence of evidence, innocence of crime is presumed by law; the burden of proof is cast upon the party asserting criminality (*ante*, pp. 16–17), and its commission, whether the question arises in criminal or civil cases, must be proved not by a mere preponderance of evidence, but beyond a reasonable doubt (Tay. ss. 112–118; Steph. art. 94; *ante*, p. 3).

Omnia præsumuntur ritè esse acta.—This presumption, which is nearly akin to that of innocence, is chiefly applied to judicial and official acts; and, though sometimes conclusive (see, *e.g.*, as to the correctness of records, and the due execution of ancient documents, *supra*), is in general only rebuttable. Thus, the constant performance of divine service from an early period in a chapel raises a presumption of its due consecration (Rugg *v.* Kingsmill, L. R. 1 Ad. & Ec. 343; R. *v.* Cresswell, 1 Q. B. D. 446; *ante*, p. 49).

So common instances of the presumption in its rebuttable form occur with respect to the validity of a person's appointment to a public office, from his acting therein (*ante*, p. 49); and as to the due execution of deeds and wills (*infra*). [Tay. ss. 143–149; Best, ss. 353–365; Powell, 83–99; Ros. N. P. 43–44.]

Presumptions affecting Documents.—Date: It is a general *primâ facie* presumption that all documents were made on the day they bear date. When, however, there is reason to apprehend *fraud or collusion* (Tay. s. 169; Steph. art. 85; *ante*, p. 39); or when an indorsement made by a deceased person upon an instrument is used for the purpose of *defeating a plea of the Statute of Limitations*, independent evidence may be required that the writing was made at the time it bears date (*id.*; *ante*, p. 168). As to the presumptions respecting *sealing*, *delivery*, *and attestation*, see *ante*, p. 362; and as to those respecting *alterations*, pp. 367–368.

Equitable Presumptions.—It is beyond the scope of the present work to enter at large upon this subject; but a few of the more common equitable presumptions—*e.g.*, those as to *double portions*, *satisfaction*, *ademption*, and *cumulation of legacies*—have already been referred to in connection with the admissibility of extrinsic evidence to rebut an equity (see *ante*, p. 418–419).

Presumptions of Fact.—Presumptions of fact are, as we have seen, simply logical inferences of the existence of one fact from the proof of another. They are the inferences or presumptions which render circumstantial evidence admissible, and have already been considered at length under the head of relevancy and relevant facts.—Presumptions of fact of the more cogent kind will, as we have seen, shift the burden of proof, no less than rebuttable presumptions of law (*ante*, p. 16).

ESTOPPELS.—An estoppel is a rule of law, or, in some cases, of evidence merely, by which a party is precluded from denying the existence of a given state of facts which he has previously asserted.

Estoppels are sometimes treated under the head of conclusive presumptions of law (Tay. s. 89); and sometimes as being in the nature of solemn admissions (2 Sm. L. C. 8th ed. 801), or conclusive evidence. They are, however, dis-

tinguishable from each of these—*e.g.*, from the first named, in that an estoppel may be waived by the party in whose favour it operates (*ante*, p. 282; Scarf *v.* Jardine, 7 App. Cas. 345); from the second as well as the first, in that it cannot in general be taken advantage of by strangers; and from the third in that the conclusiveness of evidence may result from mere logical cogency, and when it results from some rule of law it operates indifferently for or against all persons.

Estoppels are of three kinds: (1) By Record; (2) By Deed; and (3) By Conduct. When falling under the first and second heads they must be *pleaded* if there be an opportunity of pleading them, otherwise they will be deemed to be waived; and they must generally be *mutual*—*i.e.*, both parties must be bound or neither will be; strangers not being allowed to take advantage of such estoppels. When falling under the third head they need not be pleaded (Tay. s. 92; *sed qu.*, perhaps, under the present practice); and need not always be mutual. Estoppels by record and deed, and many of those arising from conduct, may more conveniently be treated as rules of substantive law than of evidence.

There is one general rule which applies to all estoppels alike—they cannot override the general law of the land (Cababé, p. 123). Thus, where writing is required by statute, no estoppel will cure the defect (Hunt *v.* Wimbledon Local Board, 4 C. P. D. 48). So a judicial record (*ante*, p. 276) or deed (*infra*) may always be impeached for fraud or illegality. And the same is true as to incapacity of parties —*e.g.*, a married woman, precluded from contracting by reason of coverture is not bound by her representation that she is single (Cannam *v.* Farmer, 3 Ex. 698); nor is an infant by his representation that he is of full age; for though he is liable in equity to restore any advantage gained thereby he is under no obligation to perform the contract (Pollock on Contracts, 5th ed. 74–75, where this distinction is clearly drawn). Similarly, a corporation is not estopped as to acts which are *ultra vires* (British Mutual Banking Co. *v.* Charnwood, 18 Q. B. D. 714).

[Tay. ss. 89–103; Best, ss. 532–545, and see note to the first-mentioned section in Chamberlayne's Am. ed.; Powell, 248–282; Steph. arts. 102–105; note xxxviii.; Everest and Strode on Estoppel; Cababé on Estoppel.]

Estoppels by Record.—The chief of these are judgments, the conclusiveness of which has already, for convenience sake, been considered in conjunction with their admissibility (see fully, *ante*, pp. 274–350).

An estoppel by record is also probably created by letters patent between the Crown and the grantee, but this will not extend the benefit of the estoppel to all her Majesty's subjects (Cropper *v.* Smith, 26 Ch. D. 712).

Estoppels by Deed.—Where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he is not permitted to deny any of the facts which he has so asserted (Bowman *v.* Taylor, 2 A. & E. 291, *per* Taunton, J.).

This rule must, however, be received with the following qualifications:—

(1) *The estoppel only applies between parties and privies, and in actions on the deed.*—It does not apply to actions on collateral matters even between the same parties (*Ex parte* Morgan, *In re* Simpson, 2 Ch. D. 72); nor does it apply in general to proceedings between strangers, or a party and a stranger (Tay. s. 99; *ante*, p. 397.)

The rule as to mutuality is relaxed in the case of a *Deed-poll*, since only the maker and his privies are intended to be bound thereby (Tay. s. 99); while even in the case of an *Indenture*, one party alone may sometimes be bound —*e.g.*, where he has gained an action or some other advantage on the footing of a given construction of the deed, he is estopped from afterwards setting up a different construction thereof (Gandy *v.* Gandy, 30 Ch. D. 57; Roe *v.* Mutual Loan Fund, 19 Q. B. D. 347; Marshall *v.* Berridge, 19 Ch. D. 233; see also as to recitals in indentures, *infra*.)

(2) *No estoppel arises upon recitals or descriptions which are either immaterial or not intended to bind.*—With regard to the materiality of a recital the following conditions must exist in order to raise an estoppel:—(1) There must be a distinct statement of some material particular fact (*e.g.*, in a grant of land by A., a covenant that he had power to grant will not create an estoppel, though a statement that he was seised of the legal estate would, General Finance Co. *v.* Liberator Soc. 10 Ch. D. 15); (2) a contract made with reference to such statement; and (3) an action founded upon, or brought to enforce the rights

arising out of, the instrument (Carpenter *v.* Buller, 8 M. & W. 212; *Ex parte* Morgan, *In re* Simpson, *supra;* Tay. ss. 96–98; *ante*, p. 399). If these conditions concur, indeed, a recital in an instrument *not* under seal will estop (*id.*).

A recital, however, binds all the parties to the deed only when upon the construction of the instrument the statement appears to be one which all have agreed to admit as true; if it is intended to be the statement of one party only, he alone is estopped (Stronghill *v.* Buck, 14 Q. B. 787; Young *v.* Raincock, 7 C. B. 310; Blackhall *v.* Gibson, 2 L. R. I. 49).

Where the recital is of another deed or document, the former is not secondary but primary evidence of the latter, and constitutes a muniment of title which cannot be controverted (Tay. s. 98); but this applies only to so much of the deed as is actually recited; the other portions must be proved in the ordinary way (Gillett *v.* Abbott, 7 A. & E. 783).

Married women are estopped by recitals in deeds duly executed and acknowledged by them (Jones *v.* Frost, L. R. 7 Ch. 776); but not infants by recitals in deeds executed by their guardians (Miller *v.* Harewood, 18 Ves. 274).

The mere tender of the engrossment of a deed for execution is not such an admission as amounts to an estoppel (Bulley *v.* Bulley, L. R. 9 Ch. 739).

(3) *No estoppel where deed is tainted by fraud or illegality.*—As we have already seen, a party to a deed is not precluded from impeaching it on the ground of fraud, duress, infancy, or the like (*ante*, p. 398); so where both parties know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of any statute, or of public policy, neither party will be estopped from proving these facts, although the effect may be to enable either to take advantage of his own wrong (Tay. s. 93).

(4) *A deed which can take effect by interest shall not be construed to take effect by estoppel* (Doe *v.* Barton, 11 A. & E. 311).—Thus, if a party leases premises to another for a longer term than he himself possesses, it only enures to the extent of his own interest and no further (*id.*; Doe *v.* Seaton, 2 C. M. & R. 730); but where he leases premises to which he has no title, this will estop the parties to the deed from alleging his want of title—*i.e.*, as the lease cannot enure

by interest it will by estoppel; should he, however, subsequently purchase the land, the lease which originally enured by *estoppel* will be converted into a lease *in interest*, and his heir or assignee will be bound thereby equally with the lessee and his assignees (Tay. s. 100; Webb *v.* Austin, 7 M. & G. 701; Sturgeon *v.* Wingfield, 15 M. & W. 234).

Estoppels by Conduct.—Estoppels by conduct, or, as they are still sometimes called, estoppels by matter *in pais*, were anciently acts of notoriety not less solemn and formal than the execution of a deed, such as livery of seisin, entry, acceptance of an estate, and the like; and whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed (Lyon *v.* Reed, 13 M. & W. 309). The doctrine has, however, in modern times been extended so as to embrace practically any act or statement by a party which it would be unconscionable to permit him to deny. The rule has been authoritatively stated as follows:—"Where one by his words or conduct *wilfully* causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" (Picard *v.* Sears, 6 A. & E. 469). And whatever a man's real intention may be, he is deemed to act *wilfully* "if he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it" (Freeman *v.* Cooke, 2 Ex. 654; McKenzie *v.* British Linen Co. 6 App. Cas. 82; Carr *v.* London and N. W. Ry. Co. L. R. 10 C. P. 316; Seton *v.* Lafone, 19 Q. B. D. 68; Coventry *v.* Great Eastern Ry. Co. 12 Q. B. D. 776).

An estoppel by conduct may arise either from agreement, misrepresentation, or negligence.

(*a*) *From Agreement.*—The agreement may be *express*—*e.g.*, where the plaintiff had obtained a reduction in the rate for the carriage of his horses by a declaration that their value did not exceed £10 each, he was estopped in an action against the defendants for injury to the horses, from disputing that their value was greater than that sum (McCance *v.* London and N. W. Ry. Co. 34 L. J. Ex. 39); or it may be *implied* from the conduct of the parties, or the nature of the transaction (Cababé on Estoppel by Conduct).

Instances of estoppels arising from agreement implied from the conduct of the parties, occur in those cases in which a company is precluded from denying the validity of its own share certificates, even though they have been forged by the secretary (Shaw *v.* Port Philip Mining Co. 13 Q. B. D. 103; Powell, 264–266). But a mere provisional certification creates no estoppel against the company (Bishop *v.* Balkis Co. 25 Q. B. D. 512); nor does a blank transfer estop the owner from proving his title as against a third party who has advanced money on the shares (Colonial Bank *v.* Cady, 15 App. Cas. 267). The following are the chief cases in which an estoppel arises from the nature of the transaction itself:

Landlord and Tenant.—A landlord who has granted a lease, whether by deed or not, is estopped from alleging his want of title to the premises. And conversely, a tenant or lodger or the alienee of either, cannot, during his possession of the premises, deny his landlord's title at the time of entry (Balls *v.* Bestwood, 2 Camp. 12; Doe *v.* Mills, 2 A. & E. 17). But the tenant may show that such title has expired (England *v.* Slade, 4 T. R. 682); or that a parcel of land about which he and the lessor are disputing was never comprised in the lease at all (Clark *v.* Adie, 2 App. Cas. 435, *per* Lord Blackburn; Cababé, 24); or that he has been evicted by title paramount to his landlord's (Gouldsworth *v.* Knights, 11 M. & W. 344). Mere receipt or payment of rent, however, though raising a strong presumption of tenancy, does not of itself operate as an estoppel (Knight *v.* Cox, 18 C. B. 645; Crawford *v.* Gillmor, 30 L. R. I. 238). [Tay. ss. 101–108; Powell, 255–256; Steph. art. 103].

Bailor and Bailee.—A bailee is estopped from denying that his bailor had at the time of the bailment authority to make it (Gosling *v.* Birnie, 7 Bing. 338); but when the bailee is evicted by title paramount he can, with the consent of the evictor, set up the latter's title against the bailor (Biddle *v.* Bond, 6 B. & S. 225; Rogers *v.* Lambert, 24 Q. B. D. 573).

Licensor and Licensee.—A licensee of a patent cannot dispute the validity of the patent as against the licensor. But he may show that what he has done does not fall within the scope of the patent, and may refer to former patents to show what is the proper construction of the patent in question (Clark *v.* Adie, 2 App. Cas. 413); nor is

he estopped from disputing its validity against an assignee who has not bought on the faith of the statements in the patentee's petition to the Crown (Cropper *v.* Smith, 26 Ch. D. 700.)

Principal and Agent.—Similarly an agent is estopped from disputing the title of his principal (Dixon *v.* Hamond, 2 B. & Ald. 310).

As to estoppels between the *acceptor of a bill of exchange* and a *holder in due course*, see Bills of Exchange Act, 1882, ss. 54, 55.

(*b*) *From Misrepresentation or Negligence.*—An estoppel by conduct may arise from an untrue representation of fact, not only when fraudulently, but even when innocently, made (Vagliano *v.* Bank of England, 1891, A. C. 107; Low *v.* Bouverie, 1891, 3 Ch. 82; Colonial Bank *v.* Cady, 15 App. Cas. 267). And conduct by negligence, omission, or even silence, where there is a duty cast upon the person to disclose the truth, may often have the same effect (*id.*; Freeman *v.* Cooke, *supra*, and cases cited therewith; Arnold *v.* Cheque Bank, 1 C. P. D. 578; Johnson *v.* Crédit Lyonnaise, 3 C. P. D. 32).

In order to raise such an estoppel the following conditions are necessary:—(1) There must be a representation of fact, a mere statement of intention is insufficient (Citizens' Bank of Louisiana *v.* Bank of New Orleans, L. R. 6 H. L. 352); and it must be clear and unambiguous (Low *v.* Bouverie, *supra*). (2) There must have been an intention or conduct raising a reasonable presumption thereof, that the injured party was meant to act upon the representation as true (Freeman *v.* Cooke, *supra;* McKenzie *v.* British Linen Co. *supra;* Seton *v.* Lafone, *supra*). (3) There must have been a detriment suffered by the party relying on the estoppel (McKenzie *v.* British Linen Co., *supra*). And (4) The mis-statement or negligence must have been the proximate cause of the detriment (Baxendale *v.* Bennett, 3 Q. B. D. 525; Mayor, &c., of Staple of England *v.* Bank of England, 21 Q. B. D. 160), or, perhaps, more strictly, of the error which caused the detriment (Swan *v.* North British Australasian Co., 2 H. & C. 175; Vagliano *v.* Bank of England, *supra;* Cababé p. 145).

[Cababé on Estoppel by Conduct; Everest & Strode on Estoppel, 239–390; Tay. ss. 839–856; Ros. N. P. 77.]

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